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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,

Petitioner,

v.

TOWN OF EAST LONGMEADOW, et al.,

Respondent.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

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QUESTIONS PRESENTED

1. Does the Free Exercise Clause prohibit a local school board from subjecting a private religious school to an entirely discretionary approval process?

2. Does a local school board's ongoing review and approval of a church-run school involving subjective reviews, multiple visits, control of teacher credentials, discretionary review of the "adequacy" of instruction, and discretionary review of textbooks contravene the excessive entanglement standard of the Establishment Clause?

3. Does Fed. Rule of Civ. Proc. 52(a) prohibit an appellate court from conducting de novo review of the findings of fact concerning predicate facts and facts stemming from expert testimony in a First Amendment case?

PARTIES

Petitioners are New Life Baptist Church and Academy, Reverend David C. Chase (pastor), Richard Romero (parent) and Johna Opsitnick (student). Respondents are East Longmeadow Public Schools, and, as an intervenor, the Commonwealth of Massachusetts.

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OCTOBER TERM, 1989

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Petition for a Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on September 7, 1989.

OPINIONS BELOW

This matter was tried in a thirteen-day bench trial in the United States District Court before the Honorable Mark L. Wolf, District Judge. The findings of fact and conclusions of law by the district court were contained in a lengthy opinion issued on July 27, 1987. This opinion is reported at 666

F.Supp. 295. This opinion appears in the appendix beginning at 51a. It was supplemented by an opinion issued on May 16, 1988, which is reported at 718 F.Supp. 2. This opinion appears in the appendix beginning at 170a.

The United States Court of Appeals for the First Circuit reversed the district court in an opinion issued on September 7, 1989. It is published at 885 F.2d 940 and appears in the appendix beginning at 1a.

JURISDICTION

This case was decided and judgment entered by the United States Court of Appeals for the First Circuit on September 7, 1989. A timely motion for reconsideration was denied on October 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or denying the free exercise thereof . . . .

Mass. Gen. Laws ch. 76 § 1:

> . . . For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching . . . .

STATEMENT OF THE CASE

The district court aptly described this case[1] as "a conflict between members of a small church and school officials of a small town [which] raises issues concerning the separation of church and state which are as old and enduring as our nation itself." 666 F.Supp at 294.

New Life Baptist Church was founded in East Longmeadow, Massachusetts in 1977. It is an independent, fundamentalist Baptist church. In August 1981, the church established the New Life Baptist Academy to provide biblically-based academic education for members of its church and the Church

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[1]This case was brought under 42 U.S.C. § 1983 alleging a denial of federal constitutional rights under color of state law.

universal.[2]

As demonstrated by a stipulation signed by counsel for all parties, the church sincerely believes that it violates Scripture to divide knowledge into categories of sacred and secular.[3] The stipulation further provides:

> It is the religious belief of the Plaintiffs, that all knowledge is inescapably religious, and that all truth is either revealed by God or discovered by man as created and designed by God.
>
> It is the further belief of Plaintiffs herein, that the "secular" and "religious" aspects of education are impossible to separate, and that the moral and religious values are inextricably intertwined. Pursuant to these religious beliefs, the Church, through their educational ministry, teaches all subjects from a biblical and Christian view of the world. Such Christian education is believed by Plaintiffs to be a very necessary part and purpose of the Church's existence.

Joint Record Appendix at 249.

Thus, it is inaccurate to speak of the "secular" component of the church-school's curriculum or teaching. The church-school teaches all of the

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[2]The church believes that all born-again Christians are a part of the body of Christ, which comprises the Church universal.

[3]Joint Record Appendix at 247.

academic subjects required by state law, but it teaches these subjects from a religious rather than a secular perspective.

The parties stipulated that the church sincerely believes that it is compelled to provide, as a ministry of the church, "a school which shares, teaches, and instills in the children a like faith, and has for its primary purpose the propagation of the same religious belief of the church and parents to the children in the school." Joint Record Appendix at 249-250. The parties also stipulated that it was a violation of the plaintiffs' beliefs to send their children to a school which teaches precepts or doctrines contrary to the mandates of Holy Scripture. *Id.* at 250.

The parties stipulated that the church employs the following standards for the hiring of its teachers: A teacher must be "born again, called of God to teach for the express purpose of making further adherents to their faith, members of the New Life Baptist Church or a church of like faith, observe the tenants of that faith and demonstrate an intense love for children." *Id.*

It is the church's beliefs about its interaction

with government which led to the clash with the local school committee. The parties set forth the following stipulation about those beliefs:

> Plaintiffs believe that the New Life Baptist Church's educational ministry is operated as a scriptural requirement mandated by God. Plaintiffs further believe that to submit this educational ministry of the Church for the prior or continued approval of secular authorities violates the Sovereignty of Christ over His church. Plaintiffs believe that to allow such violation of the Sovereignty of Christ would be to share with another the glory that belongs to God alone, which is forbidden in Scripture, and would be sin to the Plaintiffs.

Id.

After one year of operation of the church-school, the Superintendent of the East Longmeadow School District, Dr. Porter, learned of its existence. On September 9, 1982, he wrote to the church stating: "Until the school is approved by the School Committee children attending are violating the compulsory attendance law so it is urgent that your school be sanctioned soon by the East Longmeadow School Committee." *Id.* at 362.

A series of exchanges followed between the parties through meetings and letters. Dr. Porter

indicated that the church school would have to apply for approval and submit information regarding the school in several areas of inquiry. Dr. Porter never informed New Life Baptist Academy of the standards it would have to meet in each of these areas of inquiry in order to be approved.

Pastor Chase, on behalf of the church, took the position that it would readily volunteer information about the church's school, but would not seek the government's approval of its religious ministry. It was clearly understood that the church's religious beliefs prompted this stance. Pastor Chase articulated that "we have not in the past nor do we in the future have any desire for an outside organization to approve any of our church ministries." *Id.* at 387.

The school committee did not have any written policy governing the approval of private religious schools. Indeed, the court of appeals labeled the school committee's regulatory scheme "a proposal." 885 F.2d at 942.

The district court distilled the school committee's "proposal" to the following:

(1) The private school must make a request for

approval. . . .

(2) The private school must provide information concerning the curriculum; the school hours and number of school days; the identity of pupils; the qualifications of the teachers; compliance with anti-discrimination laws; and conformity of the building with health and safety standards.

(3) Teachers must have college degrees[4], although if there were a small number studying for college degrees not yet earned, approval might be obtainable.

(4) The subjects required by Massachusetts law must be taught. Instructional materials must be reviewed by East Longmeadow officials to assure that they cover the legally required subjects in a thorough and efficient manner.

(5) During the second year of a school's operation, East Longmeadow school officials must visit the private school to discuss the curriculum, review instructional materials, and observe classes being taught. If the officials were immediately satisfied with the adequacy of instruction, a single visit might suffice. If, however, East Longmeadow could not as a legal or practical matter rely on college degrees of the teachers, its officials would have to go into

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[4] As the district court noted in its opinion, subsequent to the trial of this case, the Supreme Judicial Court of Massachusetts ruled that its law did not permit school committees to demand that teachers in private schools possess college degrees. *Care and Protection of Charles*, 399 Mass. 324, 504 N.E.2d 592 (1987).

> classrooms on a frequent basis to observe actual teaching. In addition, if the representatives of East Longmeadow perceived deficiencies in a school's program, they would inform the school of their concerns and offer advice and assistance to achieve improvements in instruction. The School Committee's final judgment on whether to grant approval would depend on how well the school responded to its criticisms and suggestions.
>
> (6) The initial process would, if successful, take about two years. An approved private school's right to continued approval would be reviewed every two years.

Based upon this ongoing, subjective process, the church determined that it would be yielding the ultimate authority for the management of its school to agents of the government. This violated the church's beliefs requiring it to maintain separation from the government and to not seek approval from anyone other than God.

The church clearly attempted to cooperate and to seek alternatives. In lieu of this subjective form of review and approval, it offered to submit objective information about the school, its curriculum, its textbooks, its students, and their achievement test scores. The church believed that the government

could satisfy its legitimate interests based on such information without the ongoing entanglements involved in the "approval process".

After a thirteen-day bench trial, which included testimony from expert witnesses for both sides, the district court entered a lengthy opinion containing numerous findings of facts and conclusions of law.

The district court held that the opinions of this Court require "strict scrutiny" of government attempts to burden sincerely held religious beliefs. 666 F.Supp. at 312. It also held that it is incumbent upon the government to bear the burden of proving that its regulation of religion is "essential" for the fulfillment of a compelling state interest and that the government is employing the least restrictive means of achieving such an interest. *Id.* Based on these standards, the district court gave the following summary of its holdings concerning the free exercise issue:

> When, as here, there is a conflict between individuals' constitutional rights to the free exercise of their religious beliefs and the state's compelling interest in assuring that children are adequately educated, the government must show that it is using the least restrictive means possible to satisfy its interest. Defendants have

> failed to demonstrate that the requirements they have sought to impose on plaintiffs are essential to assuring that the children involved in this case will be adequately educated. Rather, the evidence demonstrates that relying upon either standardized testing and appropriate individual follow-up, or such testing, follow-up and a requirement that each teacher have appropriate academic credentials, is a less burdensome means of satisfying the state's interest. Thus, the defendants' conduct in this case violates plaintiffs' rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

Id. at 294.

The district court also held that the ongoing involvement of the public school officials with the operation of the church school violated the Establishment Clause's prohibition of excessive entanglement between the church and state. *Id.* at 295.

The district court made it quite clear that it was not imposing its "least restrictive means" findings as a policy which the school committee must implement. It deferred to the school committee to come up with a final policy in light of the constitutional guidelines set forth in its opinion. The district court made this clear, saying:

> The findings of fact and legal analysis on which these conclusions are based are described in detail in this opinion. It is important to recognize, however, that although this opinion decides, subject to possible judicial review, the legality of specific conduct, it does not eliminate the competing, compelling concerns of each of the parties or decide the precise parameters of a constitutionally permissible reconciliation of those interests. Thus, continued interaction between the parties is required.
>
> It remains necessary for defendants to determine in light of this decision how they will attempt to satisfy in a constitutionally acceptable manner the state's important interest in assuring that the children who attend New Life Academy are adequately educated. The plaintiffs will have to respond to defendants' renewed efforts to discharge their responsibilities. If the parties proceed in the spirit of tolerance and respect for the integrity of each others' views which inspired the First Amendment, a mutually acceptable accommodation should be attainable. In the absence of such an effort, further litigation may be inevitable.

Id. at 295-296.

The court of appeals rejected the district court's implementation of "strict scrutiny" in favor of a "balancing test" approval to its analysis of First Amendment freedoms. In so doing the court of

appeals rejected the conclusion that the undefined approval process[5] was not the least restrictive means for the state to achieve its interests. Apparently placing the burden of proof of the least restrictive means on the plaintiffs, the court of appeals said:

> We conclude that standardized testing does not offer an alternative that so better serves the relevant constitutional interests that the First Amendment requires its adoption.

885 F.2d at 942.

> We do not find the "standardized testing" proposal to be a satisfactory, significantly less burdensome alternative. And we do not find the School Committee's proposed procedure leads to "excessive entanglement" with religion, in violation of the Establishment Clause.

885 F.2d at 944.

The crux of the court of appeals' opinion lies in its choice of authority for evaluating the religious

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[5]The court of appeals recognized that the school committee's approval process was undefined in the following statement:

> But, at this stage of the proceeding, before the School Committee has presented or applied its precise standards (other than the standards contained in the statute), we have no reason to think that the substantive content of those standards will prove constitutionally impermissible.

885 F.2d at 945.

freedom claims of New Life Baptist Academy. The court of appeals placed special emphasis on statements made by this court in *Runyon* v. *McCrary*, 427 U.S. 160, 178 (1976); *Board of Education* v. *Allen*, 392 U.S. 236, 245-247 (1968); and *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947). All of these quotations endorse the proposition that state regulation of private education is constitutionally permissible.

The court of appeals did not seek to determine whether the Constitution imposes any limitations on such regulatory power. Having recognized the existence of such power, it was content to endorse its use even in circumstances where religious schools must submit themselves to undefined and subject review for approval by government agents.

REASONS FOR GRANTING THE WRIT

I

The Free Exercise Clause Issues Merit This Court's Attention

This Court has never granted review of a constitutional challenge to state regulation of private

religious schools.[6] Such review has been sought in numerous cases.[7] However, this Court has made multiple pronouncements about the constitutional propriety of such regulation. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925), this Court said:

> No question is raised concerning the power of the state reasonably to regulate all schools, to

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[6]We distinguish cases where state governments have attempted to ban private education. This Court has dealt with three such cases: *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), where the State of Oregon attempted to directly ban all private education; *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), where the state attempted to ban all private education taught in a foreign language; and *Farrington* v. *Tokushige*, 273 U.S. 284 (1927), where the territorial government of Hawaii, under the guise of regulation, effectively banned foreign language schools.

[7] *Johnson* v. *Charles City Community Schools Board of Education*, 368 N.W.2d 14 (Iowa 1985); *cert. denied sub nom.*, *Preussner* v. *Benton*, 474 U.S. 1033 (1985); *Sheridan Road Baptist* v. *Department of Educ.*, 426 Mich. 462, 396 N.W.2d 373 (1986), *cert. denied*, 481 U.S. 1050 (1987); *State ex rel. Douglas* v. *Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed for want of a substantial federal question*, 454 U.S. 803 (1981); *State of North Dakota* v. *Rivinius*, 328 N.W.2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983); *State of North Dakota* v. *Patzer*, 382 N.W.2d 631 (N.D. 1986), *cert. denied*, 479 U.S. 825 (1986); *State of North Dakota* v. *Melin*, 428 N.W.2d 227 (1988), *cert. denied*, __U.S.__, 109 S.Ct. 367, 102 L.Ed. 2d 357 (1988); *State of North Dakota* v. *Anderson*, 427 N.W.2d 316 (N.D. 1988), *cert. denied*, __U.S.__, 109 S.Ct. 491, 102 L.Ed. 2d 528 (1988); *State of Ohio* v. *Schmidt*, 505 N.E.2d 627, 29 Ohio St. 3d 32 (1987), *cert. denied*, __U.S.__, 108 S.Ct. 327, 98 L.Ed. 2d 354 (1987). We have excluded other cases from this list which were effective bans on religious home education as opposed to attempts to regulate religious private schools or home schools.

> inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

In *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), this Court said:

> This Court has said that parents may, in the discharge of their duty under compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.

In *Board of Education* v. *Allen*, 392 U.S. 236, (1968), the Court said:

> . . . [A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. . . . [If the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function.

In *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972), the Court said:

> *Pierce*, of course, recognized that where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State.

In *Runyon* v. *McCrary*, 427 U.S. 160, 178 (1976), the Court said:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools ... they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation.

None of these pronouncements have come from a case where state regulation of the academic instruction of religious private schools was directly at issue. *Pierce*, of course, involved private schools. But the Court itself said, "No question is raised concerning the power of the state reasonably to regulate all schools. . . ." 268 U.S., at 534. In other words, this statement was clearly dicta since

there was no question of such regulation before the Court. *Everson* involved a challenge to state reimbursement for transportation of children to private religious schools. No question of government regulation of private education was before the Court when it made the above-quoted statement. *Board of Education* v. *Allen*, involved an Establishment Clause challenge to loans of government textbooks to private religious schools. Once again no question of government regulation of the academic component of religious education was before the Court. *Yoder* did not involve a private school at all, but was a constitutional defense to criminal truancy charges faced by Amish parents who withdrew their children from public schools. Finally in *Runyon*, this Court faced an effort by black parents to enforce an act of Congress prohibiting racial discrimination as against private schools. Enforcement of a congressional enactment banning racism against non-religious private schools is not the kind of case which lends itself to consideration of the permissible extent of state regulation of academic education in religious schools.

These pronouncements are regularly employed

by state and federal appellate courts to thwart claims of religious freedom by private schools and home schools. The collective weight of this Court's accumulated dicta has become a burden too great for religious litigants to overcome. Yet, private education has never had its day before the United States Supreme Court. No private school has ever stood before the bar of this Court and, in the crucible of an adversarial proceeding, tested the constitutional limits of state regulation of the academic component of the school's religious education.

We respectfully suggest that the day has come for private education to receive its opportunity to be heard on this important constitutional subject. We further suggest that this case is the appropriate vehicle to test and review the limits of state regulation of the academic component of private religious education.

The district court in this case correctly stated and followed this Court's modern cases concerning

religious freedom.[8] This Court has given a generous interpretation of the Free Exercise Clause in these cases. But there has been a disproportionate number of this Court's free exercise cases which deal with unemployment compensation. Private education advocates believe that the lessons of *Sherbert* v. *Verner* 374 U.S. 398 (1963); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987), and *Frazee* v. *Illinois Dept. of Employment Security*, __U.S.__, 109 S.Ct. 1514, 103 L.Ed. 2d 914 (1989), should be fully applied to their cases. And in this case, the district court agreed, applying both the letter and the spirit of this Court's modern free exercise doctrine.

But the court of appeals distinguished this Court's modern free exercise cases and turned instead to this Court's historical collection of dicta about state regulation of private religious education.[9] Thus,

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[8] 666 F.Supp. at 311-322. The court primarily relied on *West Virginia* v. *Barnette*, 319 U.S. 624 (1943); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); *United States* v. *Lee*, 455 U.S. 252 (1982); *Goldman* v. *Weinberger*, 475 U.S. 503 (1986); and *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987).

[9] 885 F.2d at 945.

having selected the source of authority supporting the desired outcome, the court of appeals reversed the protections of religious freedom granted New Life Baptist Academy by the district court. Obviously, only this Court can clear up what we believe to be the confusion in the lower courts as to which source of authority from this Court is applicable to free exercise cases involving private schools.

Religious schools greatly rely on two decisions of this Court as the basis for their claims of religious freedom: *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). In *Pierce*, this Court clearly ruled that a total ban of private schools violates the Constitution. In *Yoder*, this Court held that unbending enforcement of compulsory attendance laws must give way to appropriate free exercise claims. In each of these cases, this Court made comments affirming the right of the state to regulate private academic education. However, neither of these cases directly involved the issue of state regulation of the academic program of private religious schools. Religious freedom advocates rely on the direct holdings of *Pierce* and *Yoder*. Regulators rely on the side-comments made

about state regulation of private education. While *Pierce* and *Yoder* are critical cases for the right to choose private education, this Court has never directly considered any case which permitted examination of the constitutionally permissible extent of government regulation of the academic component of private religious education. It is one thing to say that *some* state regulation of private education is constitutionally permissible. It is quite another to say that *all* such regulation is constitutional. We would respectfully suggest that the time is ripe for direct consideration of this topic.

There are additional reasons why this case is the appropriate vehicle for a review of the constitutional limits of state regulation of private religious education. The position of the parties presents a type of confrontation which allows the Court to fashion a comprehensive doctrine that allows for a balanced constitutional analysis in this extremely polarized area of litigation. New Life Baptist Academy is not objecting to all state regulation of private religious education. It has conceded that some form of regulation is appropriate. But it has taken religious and constitutional offense at the

method employed by the School Committee of the Town of East Longmeadow.

The Town of East Longmeadow wants to employ *a totally discretionary system of review and approval* of New Life Baptist Academy's private religious education. The court of appeals described the School Committee's regulation of this private school as "a proposal." 885 F.2d at 942. The court of appeals described the situation as follows:

> The record indicates that, at present, the School Committee would like to do the following:
>
> > (a) obtain information about the school's pupils, texts, daily class schedules, hours and days taught, compliance with health and safety rules, and curricula for each grade and subject, *New Life*, 666 F.Supp. at 300.;
> >
> > (b) examine the academic qualifications of faculty members, *id.*;
> >
> > (c) visit the school once, to meet with the administrator and to obtain a first-hand impression of teaching methods, instructional materials, and curricula, *id.*;
> >
> > (d) if the teachers lack adequate academic credentials, visit the school additional times to observe classroom teaching, *id.*;
> >
> > (e) make suggestions for correcting

> deficiencies in the school's educational program (if any), *id.*
>
> After taking these steps, the School Committee will decide whether to approve or disapprove the school.

885 F.2d at 942.

It is important to remember that these are "areas of inquiry". There have been no standards announced by the School Committee by which it will determine whether the church school has a satisfactory response to each of these areas of inquiry. New Life Baptist Academy has not been told what standards its teachers must meet to have "adequate academic credentials". The church-school does not know by what criteria they will be judged when the government official comes into their religious school to obtain a "first-hand impression of teaching methods, instructional materials, and curricula." New Life has not been supplied with objective standards for any of these areas of inquiry.

Later in its opinion, the Court of Appeals made it clear that the School Committee did not have *any* objective standards by which it intended to judge the church-run school.

> But, at this stage of the proceeding, before the School Committee has presented or applied its precise standards (other than the standards contained in the statute), we have no reason to think that the substantive content of those standards will prove constitutionally impermissible.

885 F.2d at 945.

It is indeed revealing that "at this stage of the proceeding" the School Committee has not determined the standards it will use to judge the adequacy of the academic component of this private religious school. The School Committee has gone through negotiations with the church-run school before litigation commenced. It has gone through a full-blown trial in a United States District Court. And it has gone through the full appellate procedure before the First Circuit. Not only has the School Committee failed to reveal its standards of performance to the courts, New Life Baptist Academy is equally unenlightened concerning the standards their school must meet. It is fair to assume that the School Committee itself does not know what standards it intends to apply. Rather, it apparently wants to make an intuitive judgment based on the

"vibes" it receives from the church school in the course of pursuing the "areas of inquiry".

The court of appeals' rejection of standardized testing as a key component of a less restrictive alternative in the area of private religious education creates a direct conflict between the circuits. The Eighth Circuit reached the opposite conclusion in *Murphy* v. *Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

Accordingly, we would respectfully suggest that this record is an excellent one for this Court to employ to announce the constitutional limitations of government regulation of private religious education. The Court has before it a religious school crying out, not for a "hands-off" policy but for objectivity.

The School Committee's subjective method of evaluating the "areas of inquiry" clearly offends the values announced by this Court in *Hague* v. *CIO*, 307 U.S. 496 (1939). In that case this Court held that the exercise of a constitutional right should never depend on the opinion of a government official. In *Hague*, the local Director of Public Safety had the discretion to decide who would be allowed to use the city's public parks for free speech purposes. The ordinance granting him such discretion allowed him

to deny such permission "on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' " 307 U.S., at 516. This Court struck down this statutory scheme, because this statute permitted "uncontrolled official suppression" of the constitutional rights of others based upon the mere opinion of a government official.

This case is on all-fours in this regard with *Hague*. Controlling riots is an important state goal. However, allowing one man to rule by opinion is not permissible under our constitutional system even for such a worthy goal. The education of children is also a worthy goal. But the "mere opinion" of a local school committee cannot control the free exercise of religion of a church school any more than a director of public safety can control the right of a person to free speech in a public park.

Simply put, we do not believe that this Court's various statements that endorse the concept of state regulation of private religious schools can be read to be a blanket endorsement of any and all forms of regulation. We believe that this Court should announce constitutional limitations on such regulation consistent with this Court's overall First Amendment

doctrines. At a minimum this should require regulations to be objective in nature and, by virtue of the compelling state interest-least restrictive means doctrine, be "essential"[10] for the accomplishment of the state's goal in assuring minimal educational standards. We would respectfully suggest that regulations which are either subjective or excessive (and thus not "essential") violate the Free Exercise Clause.

II

The Establishment Clause Issue Is of the Requisite Significance to Merit Review By This Court

The district court held that not only was the Free Exercise Clause violated by the School Committee's attempts at regulation, but the Establishment Clause was also violated. The district court found that the nature of the regulation

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[10] This Court has made it clear that as a part of the compelling interest test there must be a showing that the particular requirement is "essential".

> The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an overriding governmental interest . . . .

United States v. *Lee*, 455 U.S. 252, 257 (1982).

constituted "excessive entanglement" of the government with a church-related school. 666 F.Supp. at 322-325. The court of appeals disagreed, distinguishing the bulk of this Court's decisions applying this Court's excessive entanglement test for the reason that those cases involved government funding of religious education. 885 F.2d at 952-954.

But this Court has clearly pronounced that the Establishment Clause and the concern for excessive entanglement is as much a protection for churches from "too much government" as it is a protection for the government from "too much church". In *Aguilar* v. *Felton*, 473 U.S. 402 (1985) this Court struck down the New York implementation of a federal program which involved sending public school teachers into private religious schools. In so doing the Court said,

> The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, **the freedom of even the adherents of the denomination is limited by the government**

intrusion into sacred matters.

473 U.S., at 409-410. [Emphasis added].

The court of appeals, however, applied this Court's doctrine as if the Establishment Clause was a one-way street only protecting the government from "too much church". Unfortunately in the area of private religious education, the stance of the court of appeals is far too common. If the Establishment Clause is indeed to be a balanced protection for the church as well as the state, then this Court needs to demonstrate this balance by consideration of cases where it is the government which has leaped the wall of separation and it is the church crying out for protection.

III

The Court of Appeals Greatly Expanded the Role of Appellate Courts in Reviewing Findings of Fact Entered By District Courts

Finally, this Court's review is warranted to consider the application of Civil Rule 52(a) to litigation under the religion clauses of the First Amendment. The Court of Appeals reached its legal conclusions only by virtue of a deliberate

reinterpretation of the findings of facts as entered by the district court.

The court of appeals completely disregarded the findings of fact entered by the district court as to educational viability of standardized testing as a means of measuring academic progress. These findings were based on testimony of multiple expert witnesses called by both parties. The court of appeals also treated the facts as if there were only a limited number of visits proposed to observe the school. This is contrary to the clear findings of the district court and admissions made by defendants' expert, Dr. Ryan, who testified that the only means of assessing the adequacy of teachers without diplomas was by the basis of multiple visits to observe their teaching. The school committee concedes that it would allow at least some teachers without college diplomas. The decision of the Supreme Judicial Court of Massachusetts in *Care and Protection of Charles*, *supra*, makes it clear that diplomas cannot be required by state law as correctly stated by the district court in its opinion. Thus, the district court was correct in treating the facts as if multiple and frequent visits and observations would

be required.

The court of appeals cited *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) for the proposition that it is permitted to make a de novo review of the facts in a First Amendment case. It is true that this Court held in *Rosenbloom* that "First Amendment questions of 'constitutional fact' compel this Court's de novo review." 403 U.S., at 54. However, we would respectfully suggest that the Court of Appeals misapplied this doctrine. Of course the appellate court must be free to make a de novo review of the ultimate constitutional facts (i.e., Is the person a "public figure" in a defamation case?; or, Does the state have a "compelling state interest" in a free exercise case?). But here the court of appeals undertook the task of reinterpreting the predicate facts of the case. For example, the court of appeals, throughout its opinion, treated the academic component of the education of New Life Baptist Academy as "secular" in nature. This is directly contrary to a stipulation of fact entered by the parties

and approved by the district court.[11] The fact is that New Life's academic program is thoroughly religious in all of its subject areas. De novo review of ultimate constitutional facts as contemplated in *Rosenbloom* provides no justification for a wholesale revision of the predicate facts of the case.

The court of appeals' freewheeling re-interpretation of the facts is particularly egregious in the area of expert opinion. The court of appeals assumed not the role of the "nation's school board" but instead became its own expert witness on education, freely substituting its own opinions about the values of various educational practices. The court of appeals is not qualified to render an independent expert opinion on the critical issue of the academic efficacy of standardized testing. The court of appeals employed "de novo review" as a device permitting it to ignore the findings entered by the district court which were predicated on expert testimony offered by both the Academy and the School Committee. Critical admissions by the School

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[11]We set forth these stipulations in full in the Statement of the Case.

Committee's experts were blatantly ignored by the court of appeals.

This Court has clearly ruled that such factfinding is inappropriate at the appellate level even in constitutional cases. In *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986) this Court said:

> As this Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings they would have made differently. . . . We note, however, that no broader review is authorized here simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case.

We believe that the standard of Civil Rule 52(a) controls the nature of review of findings of predicate facts in First Amendment litigation. The court of appeals obviously has a different view. Expansion of *Rosenbloom* to allow appellate courts in First Amendment cases to re-decide predicate facts (particularly those based on expert opinion) is unwarranted and merits this Court's review.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

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CERTIFICATE OF SERVICE

Michael P. Farris, counsel of record for petitioners and a member of the bar of this Court certifies that on this day he mailed by first class mail three copies of the foregoing petition for writ of certiorari to counsel of record for respondents as follows:

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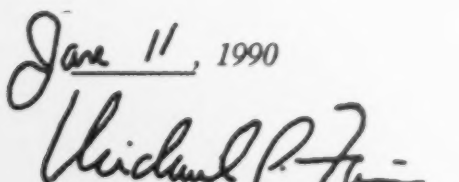

MICHAEL P. FARRIS

APPENDIX

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Plaintiffs, Appellees,

v.

TOWN OF EAST LONGMEADOW, et al.,
Defendants, Appellees.

Appeal of COMMONWEALTH of MASSACHUSETTS,

Intervenor.

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Plaintiffs, Appellees,

v.

TOWN OF EAST LONGMEADOW, et al.,
Defendants, Appellants.

Nos. 88-1610, 88-1673, 88-1611 and 88-1612.

United States Court of Appeals,
First Circuit.
Heard Feb. 8, 1989.
Decided Sept. 7, 1989.

Rehearing and Rehearing En Banc
Denied Oct. 13, 1989.

Before BREYER, ALDRICH and SELYA,
Circuit Judges.

BREYER, Circuit Judge.

This case raises questions about the extent to which the First Amendment permits a religious group to refuse to comply with state rules and procedures for determining the adequacy of the secular education that the religious group provides to children. The present controversy arises because a child cannot satisfy Massachusetts' compulsory school attendance laws by attending a private school unless the local school committee "approves" the education that the private school provides. Mass.Gen.L. ch. 76, s 1. A school committee must "approve" the private school when the school meets certain minimal statutory criteria and also offers a secular education comparable to that provided in the town's public schools. The New Life Baptist Church Academy, together with several of its members and related persons (the plaintiffs, whom we shall collectively call the "Academy"), believe that it is a sin to "submit" their educational enterprise to a secular authority for approval. The Academy claims that the First Amendment therefore forbids the School Committee of the Town of East Longmeadow, Massachusetts (the "School Committee") to "approve" the school,

particularly if the School Committee, in doing so, follows its proposed procedures for evaluating the school, procedures which essentially consist of gathering written information from the Academy, reviewing the academic credentials of the Academy's teachers, and visiting the school once (or, in the absence of adequate teacher credentials, more than once) to observe the quality of the teaching. In the Academy's view, those proposed procedures unnecessarily burden the free exercise of religion when compared with the Academy's preferred alternative, an approach that depends upon standardized pupil testing. The Academy brought this law suit to prevent the School Committee from carrying out its proposed approval process.

The district court held evidentiary hearings. It examined the School Committee's proposed procedures. It also heard evidence about how one might administer standardized tests each year to the Academy's pupils. It concluded that the School Committee's proposed approval procedures unnecessarily burden religion, given what it saw as the less burdensome possibility of "standardized testing." And, it held the School Committee's

proposed evaluation methods unconstitutional, as violating both the "free exercise" and "establishment" clauses of the First Amendment. See *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 666 F.Supp. 293 (D.Mass.1987) ("New Life ").

The School Committee (joined by the Commonwealth of Massachusetts as intervenor) appeals. We have reviewed the record, keeping in mind that "First Amendment questions of 'constitutional fact' compel [the] Court's de novo review." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54, 91 S.Ct. 1811, 1825, 29 L.Ed.2d 296 (1971) (plurality opinion) (citations omitted). See *Miller* v. *Fenton*, 474 U.S. 104, 113-15, 106 S.Ct. 445, 451-52, 88 L.Ed.2d 405 (1985) (surveying law of constitutional facts); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984) ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' " to determine the constitutional importance of the facts of the case) (citation omitted). We conclude that

standardized testing does not offer an alternative that so better serves the relevant constitutional interests that the First Amendment requires its adoption.

Consequently, the School Committee's efforts to evaluate and to "approve" the Academy, as now set forth (prior to implementation), do not violate the federal Constitution.

I.

Background

A. State law. Massachusetts state law requires nearly all children to attend school. Mass.Gen.L. ch. 76, s 1. They may attend a "public day school ... or some other day school;" but any "other day school" (i.e., private school, whether secular or parochial) must be "approved by the school committee" of the town in which the school is located. Id. The school committee must approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching. Id. The "studies required by law" include orthography,

reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the history and constitution of the United States, the duties of citizenship, health education, physical education, and good behavior. Mass.Gen.L. ch. 71, s

1. If children between the ages set by the state Department of Education do not attend a public school or an "approved" private school (or receive official permission to work or to be educated in some other setting), the state may prosecute their parents under Mass.Gen.L. ch. 76, s 2; and any person (including a town) may initiate a civil proceeding under Mass.Gen.L. ch. 119, s 24, to compel education for the children or even to remove the children from their parents.

B. The School Committee's proposal. The School Committee, complying with the statute, intends to evaluate, and then to approve or disapprove, the Academy's secular education. The Committee has developed a set of procedures to help it decide whether or not to approve a private school such as the Academy. It has modified those procedures somewhat in an effort to accommodate the Academy's religious beliefs. The record indicates

that, at present, the School Committee would like to do the following:

(a) obtain information about the school's pupils, texts, daily class schedules, hours and days taught, compliance with health and safety rules, and curricula for each grade and subject, *New Life*, 666 F.Supp. at 300;

(b) examine the academic qualifications of faculty members, id.;

(c) visit the school once, to meet with the administrator and to obtain a first-hand impression of teaching methods, instructional materials, and curricula, id.;

(d) if the teachers lack adequate academic credentials, visit the school additional times to observe classroom teaching, id.;

(e) make suggestions for correcting deficiencies in the school's educational program (if any), id.

After taking these steps, the School Committee will decide whether to approve or disapprove the school. If it disapproves, the school will have a period of time to improve, and the School Committee will then reconsider it for approval. If the School Committee approves the Academy, the committee will

review the school every two years, chiefly through written communications, to ensure that the school continues to operate satisfactorily. While ordinarily the School Committee would require a private school like the Academy to make a formal "request" for approval, see *New Life*, 666 F.Supp. at 299-300, it has said that it will seek to accommodate the Academy's religious tenets by asking the Academy simply to submit the required factual information, id. The School Committee will then conduct its "approval" examination on its own, without requiring the Academy to acknowledge that the information will be used as part of an "approval" process.

C. The Academy. The Academy is a school operated by an independent congregation of which the individual plaintiffs are members. *New Life*, 666 F.Supp. at 296-97. The Academy's religion teaches its members that God is the sovereign and the final authority in all human conduct, [and] to submit their educational ministry for the prior or continued approval of secular authorities would violate the sovereignty of Christ over his church and would, therefore, be a sin. *New Life*, 666 F.Supp. at 297. The Academy has said it has no religious objection

to:

(a) complying with state health, safety and zoning rules, *New Life*, 666 F.Supp. at 298, 302;

(b) submitting written information to the School Committee about the number of its students, the number of hours and days taught, the curriculum, texts, the number of teachers, and the criteria for hiring teachers, id.;

(c) permitting School Committee officials to visit the Academy, at least occasionally, to meet administrators and teachers, to read texts, and to observe classes, id. at 299;

(d) teaching the subjects required by state law, and holding classes the number of days required by state law, id. at 302;

(e) hiring teachers with adequate credentials, provided the state does not specify the credentials or whom the Academy must hire or discharge, id. at 301;

(f) being incorporated under Massachusetts law (which it is), id. at 302 n. 9.

The Academy does object on religious grounds, however, to taking many of these same steps if they are part of a School Committee "approval" procedure,

for the Academy does not want to admit or recognize, in any way, that the state has the authority to approve or disapprove the Academy's educational program. Id. at 300-03.

The Academy has proposed what it sees as a "less restrictive" way for the School Committee to proceed. It has proposed (1) that it furnish to the School Committee, on a voluntary basis, information about its activities, curriculum, students and teachers; (2) that it see that its students voluntarily take annual standardized examinations prepared by an outside source; (3) that it see that the School Committee obtain the exam results for review; and (4) that it provide or assist in arranging "follow-up" sessions (including discussions among students, teachers, parents, and School Committee representatives, and further testing) for students whose test results are poor. Id., 666 F.Supp. at 303, 307, 320.

D. The decision below. After holding evidentiary hearings, the district court held that the School Committee's proposed procedures violated the "free exercise" clause of the First Amendment. The court wrote that it was persuaded that (1) providing basic information concerning the students, school and

curriculum and (2) either standardized testing combined with individual follow-up when indicated, or (3) such testing and follow-up combined with a requirement that each teacher have appropriate academic credentials is less restrictive than the East Longmeadow [School Committee] approval process and sufficient to assure that New Life [Academy] students are adequately educated. *New Life*, 666 F.Supp. at 320. The district court also held that the School Committee's proposed procedures violated the "establishment" clause of the First Amendment by excessively entangling the state in the Academy's religion. Id. at 322-25. As we have noted, the district court then enjoined the School Committee from following its proposed procedures, and from prosecuting (under compulsory attendance laws) any parent whose child attends the Academy.

After examining the record, we have come to legal conclusions different from those of the district court. We do not find the "standardized testing" proposal to be a satisfactory, significantly less burdensome alternative. For that reason, we cannot say that the School Committee's proposed procedure violates the Free Exercise Clause of the First

Amendment. And we do not find the School Committee's proposed procedure leads to "excessive entanglement" with religion, in violation of the Establishment Clause.

II.

Free Exercise of Religion

For ease of analysis, we shall consider the Academy's constitutional "free exercise" claim by asking two distinct questions: First, does the First Amendment's Free Exercise Clause forbid the state (i.e., the School Committee) to insist upon approving the secular education offered by a religious school that believes it sinful to submit even its secular education program to the approval of secular authorities? Second, if not, does the Free Exercise Clause forbid the School Committee to follow its proposed approval procedures rather than the "standardized testing" procedures that the Academy prefers?

To answer each of these questions, we must determine (1) whether the Academy's religious beliefs are sincerely held, *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972);

Thomas v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 714-16, 101 S.Ct. 1425, 1430-31, 67 L.Ed.2d 624 (1981); (2) whether (and the extent to which) the relevant regulation burdens the exercise of those beliefs, *Thomas*, 450 U.S. at 717-18, 101 S.Ct. at 1431-32; *Yoder*, 406 U.S. at 220, 92 S.Ct. at 1535; *Sherbert* v. *Verner*, 374 U.S. 398, 403-06, 83 S.Ct. 1790, 1793-95, 10 L.Ed.2d 965 (1963); (3) if so, whether the regulation nonetheless serves a compelling, or overriding, governmental interest, *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); *United States* v. *Lee*, 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055-56, 71 L.Ed.2d 127 (1982); *Yoder*, 406 U.S. at 221, 92 S.Ct. at 1536; *Sherbert*, 374 U.S. at 406, 83 S.Ct. at 1795; and (4) if so, whether the School Committee might nonetheless adequately serve that interest in a "less restrictive," i.e., a less burdensome, way, *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432; *Sherbert*, 374 U.S. at 407, 83 S.Ct. at 1795.

A. The First Question: Approval in General. We believe the legal answer to the first question is clear. The Free Exercise Clause does not prohibit the School Committee from enforcing, through

appropriate means, a state law that requires "approval" of the Academy's secular education program. We concede that the Academy has a sincere, relevant religious belief that it ought not participate in any such secular approval process. See *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 1325, 99 L.Ed.2d 534 (1988); *Hobbie*, 480 U.S. at 144 n. 9, 107 S.Ct. at 1051, n. 9; *Thomas*, 450 U.S. at 714, 716, 101 S.Ct. at 1430, 1431. We also agree with the Academy that the very existence of a state approval requirement will burden the exercise of its religion by placing it under "substantial pressure ... to modify [its] behavior and to violate [its] beliefs." *Hobbie*, 480 U.S. at 141, 107 S.Ct. at 1049 (quoting *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432). That is to say, given the adverse consequences that would attend a failure to obtain approval, the state requirement could well lead the Academy to participate, at least to some degree, in the approval process, thereby violating, at least to some degree, its religious principles.

Nonetheless, the state's interest in making certain that its children receive an adequate secular education is "compelling." See *Ambach* v. *Norwick*,

441 U.S. 68, 75-76, 99 S.Ct. 1589, 1593-94, 60 L.Ed.2d 49 (1979) ("public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.' Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.'") (citations omitted); *Yoder*, 406 U.S. at 213, 92 S.Ct. at 1532 ("There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. Providing public schools ranks at the very apex of the function of a State.") (citation omitted; emphasis added); *Brown* v. *Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) ("Today, education is perhaps the most important function of state and local governments.") (emphasis added); *Meyer* v. *Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923) (education is of "supreme importance"); *Murphy* v. *Arkansas*, 852 F.2d 1039, 1042 (8th Cir.1988) ("it is 'settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated.' ") (quoting trial court); *Palmer*

v. *Board of Education of the City of Chicago*, 603 F.2d 1271, 1274 (7th Cir.1979) ("There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please."), cert. denied, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 659 (1980). And no one in this case suggests any "less burdensome" way to guarantee the adequacy of the Academy's secular education than to subject it to some form of state evaluation process.

We therefore conclude that the many cases holding that the Free Exercise clause allows a state reasonably to regulate private secular education (including secular education offered by religious institutions) govern here.

They make clear that the state of Massachusetts may, as a general matter, authorize its towns to approve or disapprove the Academy's secular education, as provided in the state statute. Mass.Gen.L. ch. 76, s 1. See *Runyon* v. *McCrary*, 427 U.S. 160, 178, 96 S.Ct. 2586, 2598, 49 L.Ed.2d 415 (1976) ("The Court has repeatedly stressed that while parents have a constitutional right to send their

children to private schools ... they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."); *Board of Education* v. *Allen*, 392 U.S. 236, 245-47 & n. 7, 88 S.Ct. 1923, 1927-28 & n. 7, 20 L.Ed.2d 1060 (1968) ("a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.... [I]f the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."); *Everson* v. *Board of Education of the Township of Ewing*, 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947) ("This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.").

Of course, the standards the School Committee applies in deciding whether to approve or to disapprove the secular education program must be reasonable. See, e.g., *State* v. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976) (striking down as "unreasonable" regulations so "pervasive and all-encompassing" that they "effectively eradicate" the school's private autonomy). But, at this stage of the proceeding, before the School Committee has presented or applied its precise standards (other than the standards contained in the statute), we have no reason to think that the substantive content of those standards will prove constitutionally impermissible.

B. The Second Question: The Proposed Procedures. The second question-- that of comparative means--is more difficult. Does the Free Exercise Clause permit the School Committee to use its preferred "information gathering" procedures (written information/teacher credentials/visits), or does it prohibit the Committee from doing so, because another procedure--the Academy's preferred method (standardized testing)--is a less restrictive alternative?

Again, we take the Academy's profession of its

religious beliefs as sincere. And we also are willing to accept the district court's finding that the Committee's proposals would burden the Academy in exercising its religious beliefs (perhaps because, compared with standardized testing, the Academy believes the Committee's procedures would involve the school more deeply in the approval process). Moreover, the state's educational interest is "compelling."

But the question remains whether or not "standardized testing" is a "less restrictive" way to achieve the state's legitimate, "compelling" goals. In answering this question, we begin with the Supreme Court's requirement that when a state chooses to attain its goals in a way which imposes a burden upon the free exercise of religion, the state must show that "it is the least restrictive means of achieving some compelling state interest," *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432 (emphasis added), that "it is essential to accomplish an overriding governmental interest," *Lee*, 455 U.S. at 257-58, 102 S.Ct. at 1055 (emphasis added).

The term "least restrictive means," however, is not self-defining. In applying that term, one must

pay heed to Justice Blackmun's caution, offered in another context, that " 'least drastic means' is a slippery slope ... [, for a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 188-89, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring). Consequently, our analysis--our effort to determine whether testing is, constitutionally speaking, a "less restrictive alternative"--must reflect additional guidance that the Supreme Court has provided, of three specific sorts.

First, the Court has repeatedly spoken of the need to "balance" compelling state interests against probable burdens upon religious freedom. See, e.g., *Texas Monthly, Inc.* v. *Bullock*, --- U.S. ----, 109 S.Ct. 890, 902, 103 L.Ed.2d 1 (1989) (plurality opinion) ("the balancing test we set forth in Lee must be performed on a case-by-case basis"); *Bob Jones University* v. *United States*, 461 U.S. 574, 603-04 & n. 29, 103 S.Ct. 2017, 2034-35 & n. 29, 76 L.Ed.2d 157

(1983) (surveying cases finding state's interest to "outweigh" free exercise claims); *Lee*, 455 U.S. at 259, 102 S.Ct. at 1056 ("The Court has long recognized that balance must be struck between the values of the [state interest and] religiously based exemptions."); *McDaniel* v. *Paty*, 435 U.S. 618, 628 n. 8, 98 S.Ct. 1322, 1328-29 n. 8, 55 L.Ed.2d 593 (1978) (plurality opinion) (describing "the delicate balancing required" in free exercise cases); *Yoder*, 406 U.S. at 215, 92 S.Ct. at 1533 (state interests "of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Though the Court has also used the term "strict scrutiny" to label its free exercise test, *Hobbie*, 480 U.S. at 141, 107 S.Ct. at 1049, it is clear from reading *Hobbie* that the Court used this label simply to distinguish its "compelling state interest" test from the less stringent test espoused by a minority of the Court in *Bowen* v. *Roy*, 476 U.S. 693, 707-08, 106 S.Ct. 2147, 2156-57, 90 L.Ed.2d 735 (1986) (Opinion of Burger, C.J.). See *Hobbie*, 480 U.S. at 141-42, 107 S.Ct. at 1049-50.

Second, the Court has emphasized the need to determine the extent to which accommodation of

religious belief will interfere with achieving the state's compelling interest. See *Lee*, 455 U.S. at 257, 259, 102 S.Ct. at 1055, 1056 ("Not all burdens on religion are unconstitutional.... [the] inquiry is whether accommodating the [religious] belief will unduly interfere with fulfillment of the governmental interest") (emphasis added); *Yoder*, 406 U.S. at 234, 92 S.Ct. at 1542 (courts must not favor alternatives that would "materially detract" from furtherance of compelling state interests); *Braunfeld* v. *Brown*, 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563 (1961) (plurality opinion) (question is whether "the state may accomplish its purpose by means which do not impose such a burden") (emphasis added).

Third, the Court has made clear that administrative considerations play an important role in determining whether or not the state can follow its preferred means. See, e.g., *Lee*, 455 U.S. at 259-60, 102 S.Ct. at 1056 (government need not create an exemption in social security tax for Amish employers, whose religious beliefs prohibit them from paying for or accepting social security benefits, because such an exemption would make it "difficult" to serve "the broad public interest in maintaining a sound tax

system"). To understand this point, which is of particular importance here, consider the possibility that a particular religious group objects, not to a state welfare program, but to the method of distribution of welfare forms, or to the location of a welfare office, or to any of the myriad ways in which the state may choose to administer its welfare programs. One may find a compelling state interest in the state's providing welfare, but it is more difficult to say that the state's interest in any particular means of distributing the welfare is "compelling." That is, it is more difficult to say this unless, and until, one takes account of the need to have some reasonably stable and reasonably flexible administrative system. For, if it is too easy for religious groups with different religious beliefs to force (perhaps through time consuming litigation) differing, say, costly or complex, administrative accommodations with too little reason rooted in their religious faiths, then a rule of law that too readily requires such multiple administrative accommodations can itself become a rule of law that prevents the state from offering the welfare or educational or other "compelling" program. That is why the

Supreme Court has warned that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires," *Lyng*, 108 S.Ct. at 1327; and why it has told us that because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," courts must not demand every last accommodation lest they "radically restrict the operating latitude of the legislature." *Braunfeld*, 366 U.S. at 606, 81 S.Ct. at 1147. See also *Lee*, 455 U.S. at 260-61, 102 S.Ct. at 1056-57 (government programs "could not function" if they had to accommodate "myriad exceptions flowing from a wide variety of religious beliefs;" "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs."). That is to say, the Free Exercise Clause must give the state some degree of administrative leeway in achieving compelling interests.

We take this authority, and these considerations, to mean that we must determine in a practical way whether or not "standardized testing" is a constitutionally mandated "less burdensome" alternative, keeping in mind the relevant

constitutional interests and their relative strengths. To what degree would "standardized testing" better satisfy the Academy's religious scruples?

To what extent would it likely permit the state to achieve its legitimate educational objectives? To what extent does it threaten potential administrative difficulties, including those costs and complexities which (when combined with the precedential effect of a rule of law that would give similar rights to control administrative detail to others with different beliefs) may significantly interfere with the state's ability to achieve its educational objectives?

In reviewing the record, we have kept in mind both these considerations and the fact that Massachusetts' legitimate interest extends, not only to the existence of private school education, but also to its quality. See *Allen*, 392 U.S. at 245-47, 88 S.Ct. at 1927-28; *Everson*, 330 U.S. at 18, 67 S.Ct. at 513; *Murphy*, 852 F.2d at 1042; *Palmer*, 603 F.2d at 1274; *Care and Protection of Charles*, 399 Mass. 324, 336, 504 N.E.2d 592, 599-600 (1987). We have also taken note of the district court's finding that the School Committee had "a reasonable basis to be concerned about the qualifications of at least some New Life

[Academy] teachers to instruct children." *New Life*, 666 F.Supp. at 306. As a result, we have concluded that the First Amendment does not preclude the School Committee from employing its approval procedures; the record reveals too many potential educationally-related difficulties, and too little alleviation of the burden on religion, to justify the district court's conclusion that standardized testing is a "less restrictive alternative." We believe, in other words, that the testing proposal would "materially detract," *Yoder*, 406 U.S. at 234, 92 S.Ct. at 1542, from the state's efforts to "accomplish its [compelling] purpose," *Braunfeld*, 366 U.S. at 607, 81 S.Ct. at 1148, thereby "unduly interfer[ing] with fulfillment of the governmental interest," *Lee*, 455 U.S. at 259, 102 S.Ct. at 1056, without a compensating reduction in the "restrictive" nature of the burden imposed on religious freedom, *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432.

First consider the educational difficulties. The standardized testing system that the district court preferred is a voluntary system; but how can the School Committee find assurance that a child will receive an adequate secular education through

reliance on a monitoring system that is voluntary? How can the Academy make certain the students and their parents agree to the testing plan? Suppose they do not. Suppose a parent refuses to permit the Academy to give the Committee the test results. Suppose a parent refuses to permit his child to participate in the testing, or in the remedial "follow-up." (Suppose, for example, a parent decided that doing so amounted to impermissible cooperation with secular authorities.) Is the School Committee then to enforce truancy laws against the individual parent? Is it to demand expulsion of the child? Is it to "disapprove" the entire Academy? And consider these problems if several parents withdraw their children from the testing scheme. It is difficult to see how a purely voluntary system for monitoring nonpublic education can serve the state's interest in assuring educational quality. Accord *Blount* v. *Department of Educational and Cultural Services*, 551 A.2d 1377, 1381-82, 1384 (Maine 1988) (rejecting voluntary plan for assuring quality of private schooling provided in compliance with compulsory attendance law).

Yet a system that relies heavily upon state laws

to force testing requirements on individual parents threatens to burden their own religious freedom. See infra p. 950.

Moreover, the testing plan provides for the School Committee to conduct remedial "follow-up" for children who test poorly; but how can the School Committee administer the individual child remedial "follow-up" without running afoul of the First Amendment's Establishment Clause, a Clause that may prohibit state-funded counseling, testing, and special remedial education, at least when provided on the private school's premises? See *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 386-88, 105 S.Ct. 3216, 3223-25, 87 L.Ed.2d 267 (1985); *Wolman* v. *Walter*, 433 U.S. 229, 241-48, 97 S.Ct. 2593, 2602-05, 53 L.Ed.2d 714 (1977); *Meek* v. *Pittenger*, 421 U.S. 349, 369-72, 95 S.Ct. 1753, 1765-67, 44 L.Ed.2d 217 (1975).

Further, can the School Committee safely rely upon standardized testing to determine what will occur in the classroom? Teacher credentials, review of written curricula, and school visits offer the Committee a way of finding out what does actually occur in respect to teaching; tests, at best, reveal

what has occurred. Can the Committee satisfactorily relate the results to past teaching? Does an average Academy-pupil score lower than an average public-school-pupil score reflect inadequate teaching, inappropriate subject matter, a different student body background, or other factors having nothing to do with the "thoroughness and efficiency" of this private school, compared with public schools? Do equivalent test results mean comparable teaching or worse (or better) teaching to different kinds of student bodies? How is the School Committee to interpret results that differ in different subject matter areas?

Can it be certain that good results reflect good teaching, i.e., the teaching of intellectual skills, discipline and complete subject matter, rather than simply teaching the answers to questions the teachers believe will appear on tests? And how can testing measure those important aspects of an adequate education that do not readily reduce themselves to standardized test questions, aspects such as practical vocational skills, the "basic tools by which individuals might lead economically productive lives?" *Plyler* v. *Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982); accord *Yoder*, 406 U.S. at 221, 92

S.Ct. at 1536 ("education prepares individuals to be self- reliant and self-sufficient participants in society"); or the values of civic participation that are "necessary to the maintenance of a democratic political system," *Ambach*, 441 U.S. at 77, 99 S.Ct. at 1595; accord *Yoder*, 406 U.S. at 221, 92 S.Ct. at 1536 ("some degree of education is necessary to prepare our citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence").

We ask these questions not to suggest they cannot be answered. Indeed, some states have answered them and use testing as a means for monitoring the quality of education in nonpublic schools, though such states may have different educational quality objectives than does Massachusetts, and we can find no state that uses a voluntary testing system, the "alternative" system at issue here. See, e.g., Alaska Stat. s 14.45.120 (1987) (mandatory testing of nonpublic school students); N.C.Gen.Stat. ss 115C-549, 115C-550 (1987) (same); S.D.Codified Laws Ann. s 13-27-3 (Supp.1989) (same, supplemented by state authority to visit nonpublic schools and to investigate the competence of

nonpublic school teachers); W.Va.Code s 18-28-3 (1988) (mandatory testing of nonpublic school students). Rather, we ask these questions in order to indicate the type of obstacles, and the significant additional administrative problems, that the need to answer them would create for, and impose upon, this School Committee: one that intends to use a written information/credentials/visit basis for determining approval, but one that is not familiar with, and is skeptical of, a system of standardized testing. Cf. *Care and Protection of Charles*, 399 Mass. at 336, 504 N.E.2d at 600 (Massachusetts' highest court concluding that "the approval process required under G.L. c. 76, s 1, is necessary to promote effectively the state's substantial interest" in assuring the quality of education) (emphasis added).

And, of course, those potential obstacles are potentially aggravated where a court imposes a legal requirement to use such a system, for then, presumably, a religious group much like the Academy, using only slightly different religious reasoning to find the written information/credentials/visit system less burdensome than the "standardized test" system, would have a

similar legal right to force the School Committee to use the former system in its case.

Legally obligated to employ the method preferred by each religious group, the towns of Massachusetts might find it difficult to implement a coherent system of furthering the state's compelling interest in educational quality; but even in the absence of multiple competing demands, the questions we have raised indicate the formidable administrative hardships that the effort to develop a standardized testing system would impose upon the School Committee.

Second, consider the comparative religious "burden." The Academy's religious objection is to the fact of secular sanction of its secular education program; it objects to any recognition of the fact that state authorities may approve or disapprove its program. The Academy has specifically stated that it does not object to supplying the School Committee with the written information that it seeks, adding that the Committee is "welcome to visit at anytime." Letter from Pastor Chase, quoted in *New Life*, 666 F.Supp. at 299. It objects to those procedures only as they are part of an "approval" process. Thus, its

religiously-based preference for the "standardized testing" method for obtaining approval must rest upon a belief that this alternative involves the Academy less, implicates the Academy less, in the secular approval granting process.

The standardized testing alternative, however, undeniably involves and implicates the Academy, at least to a degree, in the very approval process to which it objects. The Academy will have to obtain the School Committee's approval for the type of tests it gives, and the conditions in which it gives them. It will have to negotiate with the Committee about what conclusions to draw from test results, as well as the nature of "follow-up" or other remedial measures for individual students who do badly on the tests. It may have to negotiate about the changes it might make in its own programs should too many students do badly. And, since testing of each student will take place annually, this involvement potentially will take place every year. Hence the Academy will have to endure state "approval" of the education it provides to each student each year.

Moreover, the "testing" plan risks imposing still greater burdens upon individual parents or children,

insofar as it foresees the School Committee enforcing testing or remedial or alternative schooling obligations upon individual families, potentially through use of the courts, and potentially under circumstances where the Academy itself retains the state's approval. That is, unless purely voluntary, it foresees the Committee applying coercive criminal and civil enforcement measures to the parents of children who test poorly. See *New Life*, 666 F.Supp. at 321 (recommending, under testing proposal, that town enforce test-taking through criminal prosecutions and civil orders to remove children from their families). See also *Yoder*, 406 U.S. at 218, 92 S.Ct. at 1534 (finding burden imposed on religious liberty by criminal penalties); *Braunfeld*, 366 U.S. at 605, 81 S.Ct. at 1147 (similar); *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (similar).

Given the fact that the Academy has expressed a preference for standardized testing and the fact that the Academy is the best judge of its own religious needs and interests, we cannot say that standardized testing is no less burdensome than the School Committee's proposal, but neither can we see how it substantially alleviates the burden upon the free

exercise of religion, nor how it could represent a major improvement.

Finally, the weight of legal precedent is strongly against the Academy's position. Some cases specifically state that the Constitution does not require a state to employ a "standardized testing" approach in evaluating the secular education provided at private religious schools. See *Fellowship Baptist Church* v. *Benton*, 815 F.2d 485, 494 (8th Cir.1987); *Blount* v. *Department of Educational and Cultural Services*, 551 A.2d 1377, 1384-85 (Maine 1988); *Johnson* v. *Charles City Community Schools Board of Education*, 368 N.W.2d 74, 80-84 (Iowa), cert. denied sub nom. *Preussner* v. *Benton*, 474 U.S. 1033, 106 S.Ct. 594, 88 L.Ed.2d 574 (1985); *Sheridan Road Baptist Church* v. *Department of Education*, 426 Mich. 462, 484, 396 N.W.2d 373, 382-83 (1986), cert. denied, 481 U.S. 1050, 107 S.Ct. 2183, 95 L.Ed.2d 839 (1987); *State* v. *Rivinius*, 328 N.W.2d 220 (N.D.1982), cert. denied, 460 U.S. 1070, 103 S.Ct. 1525, 75 L.Ed.2d 948 (1983); *State* v. *Patzer*, 382 N.W.2d 631 (N.D.), cert. denied, 479 U.S. 825, 107 S.Ct. 99, 93 L.Ed.2d 50 (1986). Other cases uphold the constitutionality of "approval" requirements for private religious schools

that seem at least as burdensome as those present here. See *Fellowship Baptist Church* v. *Benton*, 815 F.2d 485; *Johnson*, 368 N.W.2d at 80-84; *Sheridan Road Baptist Church*, 426 Mich. 462, 396 N.W.2d 373; *State ex rel. Douglas* v. *Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571, appeal dismissed for want of a substantial federal question, 454 U.S. 803, 102 S.Ct. 75, 70 L.Ed.2d 72 (1981); *Rivinius*, 328 N.W.2d 220; *State* v. *Shaver*, 294 N.W.2d 883 (N.D.1980); cf. *Windsor Park Baptist Church, Inc.* v. *Arkansas Activities Ass'n*, 658 F.2d 618 (8th Cir.1981). Still other cases simply uphold the state approval statute itself. See *Blackwelder* v. *Safnauer*, 689 F.Supp. 106, 128-35 (N.D.N.Y.1988), aff'd on question of mootness, 866 F.2d 548 (2d Cir.1989); *North Valley Baptist Church* v. *McMahon*, 696 F.Supp. 518, 528-30 (E.D.Cal.1988); *Jernigan* v. *State*, 412 So.2d 1242 (Ala.Crim.App.1982). And some cases uphold regulations applied to religious "home school" education.

See, e.g., *Murphy* v. *Arkansas*, 852 F.2d 1039, 1041-43 (8th Cir.1988); *Duro* v. *District Attorney*, 712 F.2d 96, 98 (4th Cir.1983) (upholding effective total ban on home schooling), cert. denied, 465 U.S. 1006,

104 S.Ct. 998, 79 L.Ed.2d 230 (1984); *Blackwelder*, 689 F.Supp. at 128-35; *Hanson* v. *Cushman*, 490 F.Supp. 109 (W.D.Mich.1980); *Jernigan*, 412 So.2d 1242; *Burrow* v. *State*, 282 Ark. 479, 669 S.W.2d 441 (1984) (upholding ban on home schooling); *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953) (similar), appeal dismissed for want of a substantial federal question, 347 U.S. 972, 74 S.Ct. 785, 98 L.Ed. 1112 (1954); *Blount*, 551 A.2d 1377; *Care and Protection of Charles*, 399 Mass. 324, 504 N.E.2d 592; *Patzer*, 382 N.W.2d 631; *State* v. *Schmidt*, 29 Ohio St.3d 32, 505 N.E.2d 627, cert. denied, 484 U.S. 942, 108 S.Ct. 327, 98 L.Ed.2d 354 (1987); *State* v. *Riddle*, 168 W.Va. 429, 285 S.E.2d 359 (1981).

At the same time, this case differs significantly from the leading case in which the courts have upheld a "free exercise" claim against a state effort to control secular education provided by a religious institution. In that case, *Wisconsin* v. *Yoder*, the Supreme Court held that the First Amendment required a partial exemption (for students aged 14 to 16) from the state's compulsory school attendance law, where continued attendance for those two

additional years threatened "the continued survival of Amish communities," 406 U.S. at 209, 92 S.Ct. at 1530, where compulsory attendance after the eighth grade "would gravely endanger" the exercise of basic Amish religious beliefs, id. at 219, 92 S.Ct. at 1535, and where the Amish community's own system of education for children over age fourteen was close to "ideal," id. at 223, 92 S.Ct. at 1537. Here, unlike the case of the Amish, and as the district court noted, see *New Life*, 666 F.Supp. at 302, the School Committee's proposed procedures do not threaten interference with religious practices, prayer, or religious teaching; and the record, while indicating a sincere religious scruple, does not suggest that enforcement of the proposed School Committee procedures would destroy a religious community's way of life. Accord *State* v. *Shaver*, 294 N.W.2d 883, 897 (N.D.1980) (finding that burden imposed by prior approval statute is "minimal," "incidental," and would "not pose a very real threat of undermining the Bible Baptist Church members' community and religious practices") (emphasis in original). Nor does the record support the view that the Academy, left on its own, would provide "ideal" or even adequate secular

education. See *New Life*, 666 F.Supp. at 301 (discussing shortcomings of the Academy's educational program). All these factors make this case quite unlike *Yoder*. See also *Mozert* v. *Hawkins County Board of Education*, 827 F.2d 1058, 1067 (6th Cir.1987) ("*Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule"), cert. denied, --- U.S. ----, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988); *Blackwelder*, 689 F.Supp. at 135 ("the holding in *Yoder* must be limited to its unique facts [in which a child will live in] a successful [religious] community separate and apart from American society in general").

The only other significant case that we have found arguably relevant and helpful to the Academy is *State* v. *Whisner*, 47 Ohio St.2d 181, 351 N.E.2d 750 (1976), which invalidated state regulation of a private school where the regulations at issue provided that the board of education could control "all activities" of the private school, id., 351 N.E.2d at 765-66; the court found these regulations "so pervasive and all-encompassing" that they would "effectively eradicate the distinction between public and non-public education," id., 351 N.E.2d at 768;

and it therefore held them unconstitutional. The case before us does not involve any so burdensome, all- encompassing, regulation.

In sum, given the "standardized testing" alternative's voluntary (and thus unsatisfactory) nature, the difficult administrative problems that it threatens to impose, its uncertain potential for achieving the state's legitimate "educational quality" objectives, and the limited extent to which it will alleviate the burden the "approval requirement" itself imposes upon the Academy's free exercise of religion, we conclude that, in the factual context of this case, the "standardized testing" alternative is not a "less restrictive alternative" for First Amendment "free exercise" purposes. The First Amendment, therefore, does not prevent the School Committee from using its preferred written information/teacher credential/school visit method. We add that we now consider these latter methods only as the School Committee has proposed them here, in outline form; we are not examining their actual implementation.

Our answer to the second question, together with our answer to the first question, means that the School Committee's proposals do not violate the First

Amendment's Free Exercise Clause.

III.

Establishment of Religion

The "Establishment Clause" question in this case is whether the state "approval" requirement or the School Committee's proposed methods of gathering the information needed to decide the approval question will "foster an excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971) (quoting *Walz* v. *Tax Commission*, 397 U.S. 664, 674, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970)). The relevant elements of the proposed state activities include: a) the act of approving or disapproving; b) obtaining written information about secular teaching programs from the Academy; c) examining the teaching credentials of those who teach secular subjects; d) one or more occasional visits to the school, and e) the making of suggestions to the Academy about how it might obtain approval if it initially fails to do so. The Academy does not argue that the first two of these elements pose entanglement concerns. The review of credentials appears to be of concern only as it indicates a need for the School Committee to visit the school, and

insofar as it might lead the School Committee to insist that the Academy hire different teachers. The visits will consist of at least one initial visit where the visitors (who represent the School Committee) will read texts, examine teaching plans for secular courses, consider curricula, observe some classes, and discuss these matters with the school administration. The School Committee foresees additional visits only if the teaching credentials are inadequate. Since the Academy has no religious objection to hiring teachers with adequate credentials, and since such teachers seem available, see *New Life*, 666 F.Supp. at 301 & nn. 5 & 7, additional visits might not take place, though the School Committee may well insist that the Academy hire better-credentialed faculty. Any School Committee suggestions for improvement will concern only secular topics; neither observations nor suggestions will consider religious matters; indeed, Massachusetts law forbids the School Committee to rest its approval or disapproval upon "religious teaching." See Mass.Gen.L. ch. 76, s 1.

In determining whether this "involvement" amounts to impermissible "excessive entanglement," we assume that the Committee will implement its

procedures reasonably. We assume at this point that any visits, or suggestions, will comply with the statute's proscription against basing approval decisions on "religious teaching." (We also note that the "standardized testing" alternative also means state involvement, for example, in remedial programs for individual students.) We have kept in mind that the law prohibits only "excessive" entanglements, not all state contacts with religious institutions. See *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S.Ct. 505, 510, 74 L.Ed.2d 297 (1982). We have then compared the School Committee's proposals with the factual circumstances at issue in those cases where the courts have found impermissible entanglements. And, having done so, we can find no controlling similarities; the degree of relevant state involvement here is significantly less.

The approval requirement and procedures do not involve state provisions of financial aid nor, on any reasonable interpretation of the School Committee's proposals, do they involve, to any significant degree, state funding of educational services. See *Bowen* v. *Kendrick*, --- U.S. ----, 108 S.Ct. 2562, 2577-78, 101 L.Ed.2d 520 (1988) (noting

that the troublesome "entanglement" cases typically involve "aid to parochial schools"); *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (discussing impermissible forms of public assistance to private religious schools); *Aguilar* v. *Felton*, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) (rejecting public educational services provided at private religious schools); *Wolman* v. *Walter*, 433 U.S. 229, 241-44, 97 S.Ct. 2593, 2602-03, 53 L.Ed.2d 714 (1977) (similar); *Meek* v. *Pittenger*, 421 U.S. 349, 369-72, 95 S.Ct. 1753, 1765-67, 44 L.Ed.2d 217 (1975) (similar). Nor (interpreting the Committee's proposals reasonably) do the Committee's methods involve any "pervasive state presence in the sectarian schools," or "frequent contacts between [state and private school] teachers," *Aguilar*, 473 U.S. at 413, 105 S.Ct. at 3238. The state intends no "comprehensive, discriminating and continuing state surveillance" of the sort at issue in *Lemon*, 403 U.S. at 619, 91 S.Ct. at 2114. The School Committee's visitors will not "assess[ ] or compar[e] ... religious curricula," *Members of the Jamestown School Committee* v. *Schmidt*, 699 F.2d 1, 12 (1st Cir.), cert. denied, 464 U.S. 851, 104 S.Ct.

162, 78 L.Ed.2d 148 (1983); they will not express religious views, or express either approval or disapproval of any religious matter, see *Wolman*, 433 U.S. at 241-44, 97 S.Ct. at 2602-03; *Meek*, 421 U.S. at 369-72, 95 S.Ct. at 1765-67; nor, in any other way that we can see, will they seek to monitor the separation between religious and secular activities, see *Aguilar*, 473 U.S. at 409-13, 105 S.Ct. at 3236-38; cf. *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 765, 96 S.Ct. 2337, 2353, 49 L.Ed.2d 179 (1976) (upholding state aid where on-site monitoring of use of aid was not necessary); *Tilton* v. *Richardson*, 403 U.S. 672, 687-88, 91 S.Ct. 2091, 2100-01, 29 L.Ed.2d 790 (1971) (similar).

Given the simple "checkup" purpose of the visit, and interpreting the proposal reasonably, we cannot now say that the state is embarking upon the kind of mission that seems likely to force it to "examine the content and curricula of religious programs," *Members of the Jamestown School Committee*, 699 F.2d at 13, or to evaluate the "religious content" of the Academy's teaching, id. at 17 (concurrence). Certainly the School Committee will not exercise the overarching control of the school's possibly

religiously-motivated choices that was struck down in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502-03, 99 S.Ct. 1313, 1319-20, 59 L.Ed.2d 533 (1979) (rejecting *NLRB* jurisdiction over labor disputes at religious high schools, because *NLRB* would have to resolve unfair labor practice claims in which the school asserted that its decisions were motivated by religious creeds, decide what religious educational activities were mandatory subjects of collective bargaining, and engage in an intrusive "process of inquiry" into the religious bases of church-employee disputes), and *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 79 (1st Cir.1979) (rejecting government's continuing control over detailed expenditures of Catholic schools, because such control would "permit [the government] to intrude upon decisions of religious authorities as to how much money should be expended and how funds should be allotted to serve the religious goals of the students.").

We can imagine how the School Committee might, in practice, enforce the approval requirement and implement its proposed procedures (particularly the observation of classes) in ways that would unreasonably and unnecessarily entangle it with the

religious aspect of teaching. But one might find similar theoretical possibilities lurking within virtually any state approval procedure. Here, the proposal to observe classes is primarily a proposal to visit the school, to see if the school teaches what it says it teaches, and to observe children being taught such secular subjects as mathematics, geography, spelling, reading and writing. Additional visits will occur as an accommodation to the Academy only if the school fails to meet standards for its teachers' credentials, and then simply to see whether teachers, say, lacking university degrees, are able adequately to teach secular subjects. See, e.g., *Fellowship Baptist Church*, 815 F.2d at 494-95 (upholding teacher certification requirements); Sheridan Road Baptist Church, 426 Mich. 462, 396 N.W.2d 373 (same). We are aware of no case that goes so far as to find an Establishment Clause violation in such circumstances. Cf. *Aguilar*, 473 U.S. at 409, 410, 105 S.Ct. at 3236, 3237 (rejecting a program that "inevitably" entangles the state); *Meek*, 421 U.S. at 370, 95 S.Ct. at 1765 (rejecting "necessarily" entangling program); *Board of Education* v. *Allen*, 392 U.S. at 248, 88 S.Ct. at 1929 (upholding program where record showed no evidence

of impermissible state involvement in religion). Indeed, since the School Committee now has simply proposed, in outline form, the possibility of a future "checkup" visit, to say that the Establishment Clause forbids the proposal would amount to saying that the Clause forbids any classroom observation or "checkup," a holding that could significantly inhibit the state's efforts to evaluate the secular education provided by religious schools (or home schools), evaluations that (as we observed in Part II above) are of critical importance to the state. See *Allen*, 392 U.S. at 244-48, 88 S.Ct. at 1927-29 (finding no Establishment Clause bar to program of state assistance to private religious school students, in part because the program furthered the state interest in assuring the quality of secular education).

Since the proposal for one visit involving observing classes appears to be reasonably necessary to the state's furtherance of its compelling interest in assuring the quality of secular education, since it involves no monitoring of the uses to which secular aid will be put, see supra pp. 952-53, and since there is now no reason to believe that additional visits will improperly entangle the School Committee in

religious matters, we have no reason now to believe that the School Committee will implement its proposals in an unconstitutional way. We conclude that the School Committee's procedures for gathering information for its "approval" decision, as currently proposed, do not pose any "reasonable likelihood" of excessive entanglements, *Surinach*, 604 F.2d at 76 (citation omitted), resembling the kinds of entanglements found unconstitutional in prior cases. We therefore cannot find a violation of the First Amendment's Establishment Clause.

For these reasons the judgment of the district court is

Reversed.

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Plaintiffs,

v.

TOWN OF EAST LONGMEADOW, et al.,
Defendants.
Civ. A. No. 83-0580-W.

United States District Court, D. Massachusetts.
July 27, 1987.

MEMORANDUM AND ORDER

WOLF, District Judge.

I

INTRODUCTION

This case involves a conflict between members of a small church and school officials of a small town. Yet it raises issues concerning the separation of church and state which are as old and enduring as our nation itself. The case also presents important questions concerning the relative rights and roles of parents and the state with regard to educating children.

Massachusetts law requires that until age sixteen every child attend a public school or a private school

approved by a local school committee. Massachusetts General Laws c. 76, s 1 ("M.G.L. c. 76, s 1"). A school committee must approve a private school when satisfied that the instruction in certain subjects equals in thoroughness, efficiency, and progress that in the public schools in the same town. Id.

Plaintiffs are the New Life Baptist Church ("New Life"), its minister, and some of its members. They are born again Christians whose religion obligates them to provide a school as a ministry of their church. Thus, they have established the New Life Academy in East Longmeadow, Massachusetts. It is plaintiffs' sincere religious belief that God is the ultimate sovereign of their church and to submit its educational ministry for approval by the state would be a sin.

Defendants are the entities and officials of the Town of East Longmeadow responsible for approving private schools pursuant to M.G.L. c. 76, s 1. Defendants informed New Life that it would have to submit its Academy for approval by the East Longmeadow School Committee; advised New Life of certain essential standards and procedures it would employ in deciding whether to approve the Academy;

and warned plaintiffs that parents would be subject to possible prosecution if the New Life Academy was not approved and they continued to send their children to school there.

Initially New Life provided information to the East Longmeadow School Committee with a view to persuading the School Committee that approval of its Academy was unnecessary and inappropriate. It ultimately became evident, however, that the School Committee would continue to maintain that New Life would have to participate in the approval process, that the approval process would involve considerable surveillance of the school, and that approval was unlikely to be granted unless, at a minimum, the Academy employed more highly educated teachers. Believing that to seek approval would be a sin, and fearing that participating in the approval process would result in government control of New Life's educational ministry, plaintiffs initiated this action seeking to enjoin the defendants' effort to apply the approval requirements of M.G.L. c. 76, s 1 to New Life and requesting money damages.

[1] When, as here, there is a conflict between individuals' constitutional rights to the free exercise

of their religious beliefs and the state's compelling interest in assuring that children are adequately educated, the government must show that it is using the least restrictive means possible to satisfy its interest. Defendants have failed to demonstrate that the requirements they have sought to impose on plaintiffs are essential to assuring that the children involved in this case will be adequately educated. Rather, the evidence demonstrates that relying upon either standardized testing and appropriate individual follow-up, or such testing, follow-up and a requirement that each teacher have appropriate academic credentials, is a less burdensome means of satisfying the state's interest. Thus, the defendants' conduct in this case violates plaintiffs' rights under the Free Exercise Clause of the First Amendment of the United States Constitution.

More specifically, with regard to the Free Exercise Clause issue, plaintiffs' primary contention at trial was that reliance on the results of standardized tests and individual follow-up in appropriate cases is a less restrictive, effective means of assuring that New Life students are adequately educated. Defendants disputed the claim, primarily asserting

that every element of East Longmeadow's approval process is essential to serving the state's compelling interest in the education of New Life students. However, East Longmeadow's final expert witness, Dr. Kevin Ryan, testified that the East Longmeadow approval process was not the only acceptable means of satisfying the government's interest in the education of New Life students. Rather, he said, reliance on standardized test results and individual follow-up, coupled with a requirement that teachers have college degrees, would suffice.

Although some witnesses who preceded Dr. Ryan testified briefly on the importance of teachers having college degrees or other academic credentials indicating preparation to teach, the record was not fully developed on this issue. Since the trial of this case, the Massachusetts Supreme Judicial Court has indicated that approval of home education should be subject to the same standards as private school approval and has decided that with regard to approving home education the state may inquire into academic credentials, but not require that parents who teach have college degrees. *Care and Protection of Charles & Others*, 399 Mass. 324, 331, 339, 504

N.E.2d 592 (1987). It is not, however, necessary or appropriate for this court to decide now whether an academic credential requirement is a component of the least restrictive means of assuring that New Life students are adequately educated. The ultimate relevant Free Exercise Clause question is whether defendants have proved that the East Longmeadow approval process is the least restrictive means of satisfying the state's interest in the education of New Life students. For the reasons described in this opinion, East Longmeadow has failed to make this showing. Rather, the evidence demonstrates that either standardized testing and individual follow-up or such testing, follow-up and a requirement that each teacher have appropriate academic credentials is a less burdensome means of satisfying the state's interest than the East Longmeadow approval process. Thus, the court finds that defendants' conduct violates the Free Exercise Clause.

Similarly, government action relating to religion must not foster an excessive entanglement with religion. The means by which the defendants have sought to apply the relevant statute to New Life in this case would create an excessive entanglement with

religion. Thus, defendants' conduct also violates the Establishment Clause of the First Amendment of the United States Constitution. In contrast, the less restrictive alternative means which the state could employ to assure that New Life students are adequately educated would not violate the Establishment Clause.

In view of the foregoing, the defendants are permanently enjoined from applying to New Life the approval process at issue in this case. They are also enjoined from prosecuting the plaintiff parent for failing to send his child to an approved school. The question of a possible award of money damages remains to be decided.

The findings of fact and legal analysis on which these conclusions are based are described in detail in this opinion. It is important to recognize, however, that although this opinion decides, subject to possible judicial review, the legality of specific conduct, it does not eliminate the competing, compelling concerns of each of the parties or decide the precise parameters of a constitutionally permissible reconciliation of those interests. Thus, continued interaction between the parties is required.

It remains necessary for defendants to determine in light of this decision how they will attempt to satisfy in a constitutionally acceptable manner the state's important interest in assuring that the children who attend New Life Academy are adequately educated. The plaintiffs will have to respond to defendants' renewed efforts to discharge their responsibilities. If the parties proceed in the spirit of tolerance and respect for the integrity of each others' views which inspired the First Amendment, a mutually acceptable accommodation should be attainable. In the absence of such an effort, further litigation may be inevitable.

II

FINDINGS OF FACT

1. The Statutory Context of the Case

This case is generated, in part, by the existence of certain laws of the Commonwealth of Massachusetts. Massachusetts law requires that each child attend school until age sixteen. M.G.L. c. 76, s 1.[1] To satisfy this requirement a child must attend

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[1]M.G.L. c. 76 s 1 provides in pertinent part that: Every child between the minimum and maximum ages established for school attendance by the board of education ... shall ... attend a public day school in said town, or some other day school approved

a public school or a private school approved by a local school committee. Id. A school committee must approve a private school when satisfied that "the instruction in all the studies required by law equals in thoroughness and efficiency, and the progress made therein, that in the public schools of the same town." Id. The studies required by law are: orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the history and Constitution of the United States, the duties of citizenship, health education, and good behavior. M.G.L. c. 71, s 1.

The parties have stipulated that sixteen is the maximum age established for school attendance.

Parents who fail to send their children to a public school or an approved private school for the one hundred and eighty days required by the state's

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by the school committee, during the number of days required by the board of education in each school year ... but such attendance shall not be required ... of a child who is being otherwise instructed in a manner approved in advance by the superintendent of the school committee.... For the purposes of this section, school committees shall approve a private school when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching.

board of education are subject to possible criminal penalties. M.G.L. c. 76, s 2.[2] The parties have stipulated that this truancy statute has been enforced against fundamentalist Christian parents who have failed to comply with the compulsory education requirements of M.G.L. c. 76, s 1. In addition, any person, including a school committee, alleging that a child under age sixteen is not receiving proper educational care may initiate a civil proceeding which could result in an order removing a child from his parents or directing a specific form of education for the child. M.G.L. c. 119, s 24. This statute too has been enforced against fundamentalist Christian parents who failed to comply with M.G.L. c. 76, s 1. See *Care and Protection of Charles & Others*, 339 Mass. at 324, 504 N.E.2d 592.

2. The Parties

Plaintiff New Life Baptist Church is a fundamentalist Baptist church which opened in East Longmeadow, Massachusetts in 1977.

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[2]M.G.L. c. 76, s 2 provides: Every person in control of a child described in the preceding section shall cause him to attend school as therein required, and if he fails so to do ... he shall ... be punished by a fine of not more than twenty dollars.

Plaintiff David C. Chase is the pastor of New Life Church and the principal of New Life Academy. He has no formal training in the education of children, but was an electronics instructor in the United States Navy for many years. Although he graduated from high school, he is not a college graduate. He is now working toward a Bachelor of Arts degree in Biblical Studies.

Plaintiff Richard Romero is the step-father of plaintiff Johna Opsitnik, a former New Life student, and of her sister, a present New Life student. He enrolled Johna in New Life because he was disappointed with her progress in the Chicopee, Massachusetts public schools; he was not then a born again Christian. Mr. Romero has sued individually, as a member of New Life, and as a parent of New Life students.

Johna Opsitnik was a student at New Life until 1986. Following her graduation she briefly attended a Christian college, which she left to marry another New Life graduate then serving in the United States Air Force. The parties have stipulated that Ms. Opsitnik's claims have not been mooted by her graduation.

The defendants are the Town of East Longmeadow, the East Longmeadow School Committee, the members of the East Longmeadow School Committee, Dr. Wayne S. Porter, who was superintendent of the East Longmeadow Public Schools until his retirement in 1984, and Dr. John S. Drinkwater, Dr. Porter's successor.

The parties stipulated to certain facts relating to plaintiffs. Plaintiffs are born again Christians who share certain fundamental religious beliefs,[3] including the following.

Plaintiffs believe that the Holy Scripture is the infallible word of God. In observance of the commandments of the Bible, the New Life Baptist Church operates ministries to spread the gospel message of the salvation of man through Jesus Christ.

Plaintiffs believe that parents are required by their religion to educate their children to share their faith. They also believe that they are obligated by

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[3]Johna Opsitnik's beliefs and desires have been expressed and are shared by her step-father, Mr. Romero. Thus, this case does not require resolution of a conflict between a parent and child regarding the child's education. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 231, 242, 92 S.Ct. 1526, 1541, 1546, 32 L.Ed.2d 15 (1972).

God to provide as an indispensable ministry of their church a school which teaches their religious beliefs. For plaintiffs, the secular and religious aspects of education are inseparable. Thus, in its educational ministry, New Life teaches all subjects from a biblical and Christian view of the world. Plaintiffs believe they are forbidden to send their children to schools, such as public schools, which they believe teach doctrines contrary to the Holy Scriptures.

Plaintiffs also believe that God is the sovereign and the final authority in all human conduct. It is plaintiffs' sincerely held religious belief that to submit their educational ministry for the prior or continued approval of secular authorities would violate the sovereignty of Christ over his church and would, therefore, be a sin.

3. The Background of The Case

In August, 1981, The New Life Baptist Church established the New Life Academy to perform its educational ministry. Dr. Porter, the superintendent of the East Longmeadow public schools, later learned of the existence of the Academy. On September 9, 1982, Dr. Porter wrote Pastor Chase a letter stating that:

> The East Longmeadow School Committee is required by law, M.G.L. c. 76, s 1 to approve private schools.... Until the school is approved by the school committee children attending are violating the compulsory attendance law so it is urgent that your school be sanctioned soon by the East Longmeadow School Committee.

He enclosed a "checklist for approval" that inquired about the school's philosophy and objectives, physical plant, safety, curriculum, educational materials, staff, administration, record keeping, student services, and financial support for the educational program.

Later that month, Pastor Chase met with Dr. Porter to discuss Dr. Porter's letter. Pastor Chase said that he did not wish to seek approval, but did want to cooperate. Pastor Chase's goal was to provide information sufficient to persuade East Longmeadow that the application of its approval process to New Life was unnecessary and inappropriate. Pastor Chase explained that he found some aspects of Dr. Porter's request to be confusing. Dr. Porter agreed and undertook to consult with state education authorities with a view to refining the request to New Life.

On October 19, 1982, Dr. Porter wrote again to Pastor Chase, asking him to respond to twelve questions. These included requests for information regarding subjects offered by grade level; school hours and the number of days school was held; the school's qualification standards for teachers and staff and whether the teachers and staff met those standards; whether the school taught all legally required subjects; whether the school conformed to all health and safety standards; and whether the school was open to students of all races and religions.

On November 24, 1982, Pastor Chase responded to Dr. Porter's October 19, 1982 letter. After stating that, "[w]e have never sought the approval of any of our church ministries by non-religious organizations ...," Pastor Chase proceeded to furnish all of the information requested by Dr. Porter. This response was part of a continuing effort by Pastor Chase to accommodate the School Committee's concern without compromising his religious convictions. Among other things, Pastor Chase informed Dr. Porter that New Life Academy was open one hundred and seventy-five days each year. He also furnished the requested identification of the students

attending New Life and indicated that the school building complied with all health and safety standards.

With regard to teachers, Pastor Chase wrote to Dr. Porter that they were required to be born again; to be a member in good standing of New Life Baptist Church; to have a deep love for children; and to have the educational background to teach the necessary subjects. Pastor Chase represented that all of New Life's staff were qualified under these criteria.

Pastor Chase's response was not sufficient to satisfy Dr. Porter. On January 20, 1983, Dr. Porter wrote Pastor Chase again. In his letter, Dr. Porter pointed out that Massachusetts required that schools be operated one hundred and eighty days each year and, therefore, that New Life's school year was five days short. He also asked for additional information regarding the educational background of the New Life teachers, including their degree status,major and minor, and teaching and related experience. Dr. Porter also requested a further explanation of the New Life curriculum and asked for an opportunity to visit New Life with members of his staff to review

the school's curriculum materials and observe the teachers.

At this point, Pastor Chase apparently concluded that he would not succeed in his effort to persuade the School Committee that it was unnecessary and inappropriate to require that New Life seek approval. It was also then foreseeable that if the approval process continued New Life would not obtain approval unless, at a minimum, it upgraded the educational qualifications of its teachers, because during the 1982-1983 school year only three of the New Life Academy's eight or nine teachers were college graduates. It was also then foreseeable that the School Committee would require other reforms before approving New Life.

Following Dr. Porter's January 20, 1983 letter, plaintiffs joined with several churches of like faith and their members to initiate this litigation. On March 7, 1983, they filed suit against the organizations and officials of East Longmeadow responsible for education and their counterparts in

other towns.[4] In this action plaintiffs seek a declaration that M.G.L. c. 76, s 1, as East Longmeadow has sought to apply it to plaintiffs, violates the United States Constitution; an injunction against such application of the statute against plaintiffs; money damages for violation of plaintiffs' civil rights; and attorney's fees.

On March 9, 1983, Pastor Chase wrote again to Dr. Porter, stating in part:

> I trust you will forgive the delay in answering your letter of January 20, 1983. So much has been happening and going on these past few weeks. Due to the nature of the school situation in Massachusetts, I was instructed by Council [sic] to refrain from answering until

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[4]The original plaintiffs were several fundamentalist Christian churches and their members, including the Braintree Temple Academy in Holbrook, Massachusetts. Defendants were the counterparts of the East Longmeadow defendants in certain other communities, including the City of Boston, which was seeking to enforce the Massachusetts truancy statute against Boston residents who sent their children to the Braintree Temple Academy. In response to pretrial motions, the court dismissed the action as against several defendants. The case was also dismissed against the City of Boston defendants as part of a stipulation providing that they would not seek to enforce the Massachusetts truancy law against any resident of the City of Boston who was the parent of a Braintree Temple Academy student until this case is finally adjudicated.

The sole remaining parties were the New Life plaintiffs and the East Longmeadow defendants. They each waived their right to a jury trial. This case was, therefore, tried to this court.

after a suit had been filed in the courts. Such suit was filed in Federal District Court in Boston on March 7.

I want to assure you again, Dr. Porter, and the School Board, we are not trying to hide anything, nor be evasive. As I mentioned in my last letter, I reaffirm now, we have not in the past nor do we in the future have any desire for an outside organization to approve any of our church ministries. You are welcome to visit at anytime. I would simply ask a day or two notice. My schedule is extremely busy and I would like to give you the time you need.

On June 13, 1983, Dr. Porter replied to Pastor Chase by writing:

I have not pursued the matter of School Committee approval for the New Life Baptist Church as I did not wish to make an issue of the matter hoping that we can come to some understanding. The matter of seeking approval rests with you and your associates. If you expect the School Committee to approve the New Life Baptist Church School as required under Mass. G.L. Ch. 76, Sec. 1, you must request approval and submit detailed information on the organization of the school, courses offered at each level, the number and educational qualifications of staff, show a 180 school day calendar year with basic annual hourly requirements, curriculum outlines for each grade and subject, titles and publishers of text books used in each grade and subject area, and a master schedule showing teacher

assignments, daily classes scheduled with special provision for laboratory sciences.
Unless you take the steps for approval soon, by early August, I will have to recommend that the School Committee refer this matter to Town Counsel for legal proceedings. Please understand that the School Committee has taken an oath to uphold the laws of the Commonwealth of Massachusetts, and they must see that private schools in East Longmeadow operate legally. You can expect the School Committee to be reasonable in their determination of the adequacy of the provision of education by the New Life Baptist Church School. I shall await an answer from you soon.

All further communications between the parties have been in the context of this litigation.

4. The East Longmeadow Approval Process

As indicated earlier, the court in this case is required to decide, among other things, whether the approval process which was being implemented on behalf of the East Longmeadow School Committee was the least restrictive means necessary to satisfy Massachusetts' compelling interest in assuring that the students attending New Life Academy are adequately educated and whether ,that process fosters an excessive entanglement between the government and religion. The essential characteristics of the

standards and procedures that East Longmeadow has sought to apply to New Life, and similarly situated schools, include the following:

(1) The private school must make a request for approval. Dr. Porter's communications with Pastor Chase made this plain. Dr. Drinkwater's written "Private School Approval Process" reiterated that a private school would be required to submit certain information "accompanied by a request for approval." At trial, Dr. Drinkwater did suggest that if a private school fully participated in the approval process, but had religious objections to saying that it was seeking or accepting approval, he would not recommend that it be required to state it was seeking or accepting approval. As discussed in the Conclusions of Law, this testimony does not operate to alter the approval process litigated in this case. Nor would such an alteration alone cure the constitutional infirmities of defendants' conduct.

(2) The private school must provide information concerning the curriculum; the school hours and number of school days; the identity of the pupils; the qualifications of the teachers; compliance with anti-discrimination laws; and conformity of the

building with health and safety standards.

(3) Teachers must have college degrees, although if there were a small number studying for college degrees not yet earned, approval might be attainable.

(4) The subjects required by Massachusetts law must be taught. Instructional materials must be reviewed by East Longmeadow officials to assure that they cover the legally required subjects in a thorough and efficient manner.

(5) During the second year of a school's operation, East Longmeadow school officials must visit the private school to discuss the curriculum, review instructional materials, and observe classes being taught. If the officials were immediately satisfied with the adequacy of instruction, a single visit might suffice. If, however, East Longmeadow could not as a legal or practical matter rely on the college degrees of the teachers, its officials would have to go into classrooms on a frequent basis to observe actual teaching. In addition, if the representatives of East Longmeadow perceived deficiencies in a school's program, they would inform the school of their concerns and offer advice and

assistance to achieve improvements in instruction. The School Committee's final judgment on whether to grant approval would depend in part on how well the school responded to its criticisms and suggestions.

(6) The initial approval process would, if successful, take about two years. An approved private school's right to continued approval would be reviewed every two years.

5. The Burden on the Free Exercise of Plaintiffs' Religious Beliefs

The plaintiffs' refusal to participate in the East Longmeadow approval process has been motivated primarily by their sincere religious beliefs. Plaintiffs may also be influenced by a recognition that approval of New Life Academy as currently constituted would be unlikely. Rather, it is foreseeable that New Life would have to adopt reforms required by East Longmeadow to obtain approval. However, as explained below, the court finds that plaintiffs would for religious reasons refuse to participate in the East Longmeadow approval process even if it were evident that their Academy would be approved without any alteration.

As indicated earlier, it is plaintiffs' sincere

religious belief that it would be a sin inviting God's judgment to acknowledge that the government has the authority to approve or disapprove the educational ministry of their church. To them, participating in the current approval process would constitute the sin of subordinating God to the authority of the state. East Longmeadow's requirement that New Life request approval is to plaintiffs a civil compulsion to commit a sin. Compelling plaintiffs to sin burdens the free exercise of their religion.

In addition, the plaintiffs would for religious reasons refuse to submit New Life Academy for approval by the East Longmeadow School Committee even if approval was likely to be easily obtained. This conclusion is based on plaintiffs' testimony and reinforced by the testimony of Pastor Joseph A. Henry of the First Baptist Church of East Longmeadow.

First Baptist and New Life are each fundamentalist separatist churches. First Baptist initially participated in the process East Longmeadow was using to evaluate First Baptist's educational ministry for approval. First Baptist employs only

college-educated teachers. As the approval process approached its conclusion, it appeared that First Baptist met all of the School Committee's requirements. Yet, Pastor Henry withdrew First Baptist from consideration because, as he focused on the issue, he concluded that to participate in a process which would result in approval would be to recognize the state's authority over his church's ministry by, in effect, asking permission of the state to carry on its religiously required educational ministry. While he continued to be willing to cooperate by providing information to the School Committee, he concluded it would be a sin to participate in an approval process.

The East Longmeadow approval process would also burden the free exercise of plaintiffs' religious beliefs in a way unlikely to be experienced by Pastor Henry and the First Baptist Church. Pastor Henry and plaintiffs share a concern that the potential, practical effect of allowing the state to approve their educational ministries would be to allow the state to control aspects of it. It appears that this fear would be realized if New Life engaged in East Longmeadow's approval process. Few of New Life's

teachers are college-educated.[5] This is a matter of considerable, understandable concern to the East Longmeadow School Committee.[6] It appears, at a minimum, that the School Committee would require that New Life employ virtually all college-trained

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[5]During the 1981-82 school year, the New Life Academy had five teachers, none of whom had college degrees. During the 1982-83 school year, the New Life Academy had eight or nine teachers, three of whom were college graduates. During the 1984-85 school year, the New Life Academy had fifteen teachers, four of whom were college graduates. During the 1985-86 school year, the New Life Academy had fifteen teachers, four of whom were college graduates. Currently, the New Life Academy has fifteen teachers, six of whom are college graduates. Pastor Chase also lacks a college degree.

[6]Only two teachers testified. Neither had college degrees. The teacher who taught seventh and eighth grade math, science, and geography was a high school graduate who had been a hairdresser. She demonstrated a familiarity with how to teach basic math operations, but she did not know where Nicaragua or Afghanistan were located. Although she had taught current events in the past, she did not know the name of the leader of Iran. She also thought Bohr's theory of atomic structure was a theory about a miniature solar system. This witness was very nervous and this may have contributed to her inability to respond correctly to some questions. The other teacher who testified taught kindergarten. She was a high school graduate who had been an assistant manager of retail stores. She displayed a working knowledge of the lessons she would have to teach, but no familiarity with the literature of child development. For example, she had never heard of Piaget or Montessori. Nevertheless, the previous year when she taught third grade, she had recognized that a student had a learning disability. Standardized tests revealed the problem and, as a result, the teacher initiated appropriate follow-up.

teachers before approving its Academy. This would require the replacement of many of New Life's current teachers.

Pastor Chase testified that when he needs to obtain teachers for New Life, he prays for God to send them. College graduates who meet New Life's other criteria are available.[7] Although subject to economic constraints, plaintiffs have no religious objection to employing such college graduates. They sincerely believe, however, that it would be a sin to allow the government to dictate who New Life may or may not employ in its educational ministry because, once again, they would be compromising the sovereignty of God by submitting the church to the authority of the state.[8]

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[7]Pastor Chase testified that he has turned down five college-trained applicants for teaching positions because he did not have openings for them.

[8]Plaintiffs testified that they anticipated that submission of New Life to the approval process would result in the imposition by East Longmeadow of other requirements, such as the banning of prayer and the teaching of evolution. The evidence did not, however, indicate that these anticipated effects were likely to occur. The court has not given any weight to plaintiffs' misconceptions in deciding that the East Longmeadow approval process would burden the free exercise of their religion.

Finally, the East Longmeadow approval process burdens the free exercise of plaintiffs' religion by placing them in a position where they feel they must choose between obeying God or the state, and run the risk of retribution by the authority they decide to disobey. This has had injurious physical and psychological effects on the individual plaintiffs.

The difficult choice presented to the individual plaintiffs by the requirement that New Life seek and obtain approval also threatens the viability of the fledgling church. Present and potential members of New Life believe the church must provide a school to perform its educational ministry. The church is likely to lose some members if it does not offer a school. It is also likely to lose some members if parents are threatened with prosecution because their children attend a school which has not been approved. This is a burden on the plaintiff New Life Baptist Church.

The East Longmeadow approval process does not, however, threaten plaintiffs' way of life. In contrast to the Amish, for example, plaintiffs' religion does not require them to live apart from society. While they believe their church must be insulated

from government influence--and thus would not accept any form of government funding--plaintiffs seek to educate their children to practice their religion as productive workers and effective citizens in American society, rather than isolated from it.

Plaintiffs' religious beliefs also do not prevent them from satisfying at least some of the School Committee's concerns. For example, New Life's school building meets Massachusetts health and safety requirements. Members of the church are concerned for the safety of their children and are anxious to assure that their school building meets legal safety standards. They allow public officials to inspect the premises and issue required permits. They do not believe this compromises the sovereignty of God because, to them, the church is the members and their ministries, not the building they occupy. Thus, they do not believe that submitting their building for approval constitutes submitting their church for approval.

In addition, after Dr. Porter informed Pastor Chase that state law required that schools be open one hundred and eighty days per year, New Life extended its school year to one hundred and eighty

days. Pastor Chase testified at his deposition that this change was made to comply with state law. At trial Pastor Chase explained that this represented a voluntary decision to comply with state law and, in any event, did not in his mind present an issue of state control or approval of New Life's educational ministry.[9]

Plaintiffs' religious convictions do not prevent them from cooperating with secular authorities in other ways which are relevant to this case. Indeed, plaintiffs believe that they are commanded to obey

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[9]Nor has New Life's religious objection to seeking secular approval prevented New Life from being incorporated under Massachusetts law. Pastor Chase's testimony suggested that he had not fully understood the process of incorporation or its possible religious implications. Generally, plaintiff's religious beliefs regarding the relationship of church and state are not fully developed or entirely consistent. Nor are those beliefs identical to those of other fundamentalist Christians and their churches, some of whom seek and accept secular approval for their schools. Differences in the application of their faith on such subjects is permitted by the fundamentalist Christian church's congregational structure. Fundamentalist Christian churches share certain assumptions and beliefs, but each congregation must ultimately decide its own position on other scriptural questions, such as whether to seek approval for their schools. The court is persuaded that plaintiffs' interpretation of their faith, and their differences with some other fundamental Christians, are based on plaintiffs' sincere religious convictions.

civil law unless it conflicts with God's requirements.

Plaintiffs have expressed no religious objection to teaching all of the subjects required by Massachusetts law and have been doing so, although the quality and thoroughness of that instruction is seriously disputed. Plaintiffs also remain willing to provide all of the information requested by Dr. Porter and Dr. Drinkwater, but not for the purpose of attempting to obtain approval of New Life. Plaintiffs are, therefore, willing to disclose the identities of New Life students; describe the New Life curriculum in a manner which would indicate that the appropriate subjects are being taught; and disclose the educational qualifications of their teachers.

6. Plaintiffs' Proposal for Satisfying the State's Compelling Interest in the Education of New Life Students

Plaintiffs recognize that the state has an important, legitimate interest in assuring that all students, including those whose families are members of New Life, are adequately educated. It is their view, however, that the East Longmeadow approval process is not necessary to provide the state with this

assurance. Rather, they contend that the use of standardized tests, in conjunction with personal follow-up in appropriate cases, will assure that New Life students are progressing in learning efficiently and thoroughly the subjects in which the state is interested.

Plaintiffs have no religious objection to New Life students taking standardized tests. They are also willing to have the test scores for each New Life student submitted to the School Committee, preferably by the parents rather than New Life, as long as this is not done as part of an attempt to obtain approval for New Life.

The parents are willing to submit the test scores. They are also willing to participate in subsequent meetings with public officials when test scores suggest this is desirable in order to discuss the scores, educational difficulties a child may have, and ways to remedy such difficulties. The faculty and staff of New Life would also be available to participate in such discussions.

Plaintiffs assert that the process they propose as an alternative to the East Longmeadow approval process would achieve results which would satisfy the

state's reasonable concerns regarding the education of their children. For example, in at least one case standardized tests and subsequent efforts indicated that a New Life student had a learning disability. As a result, his parents transferred him to a public school for learning disabled children.

Plaintiffs assert that the alternative means of assuring that New Life students are adequately educated which they propose would not burden the free exercise of their religious beliefs. Nor, they say, would it excessively entangle the government and their church.

7. The Expert Testimony

The parties introduced considerable evidence regarding the value of standardized testing in meeting the state's interest in assuring that children are adequately educated generally and the sufficiency of plaintiffs' foregoing alternative particularly.

Plaintiffs presented the testimony of Dr. Cecil Reynolds, an expert in educational testing. As Dr. Reynolds and defendants' experts agreed, there are two widely accepted types of standardized educational tests. One type is a norm-referenced test which compares a student's performance to that of other

students in a reference group who have taken the test. This type of test permits one fourth grader, for example, to be compared with other fourth graders across the country or in an another school. The second familiar form of standardized test is the criterion-referenced test. A criterion-referenced test measures whether a student has mastered a certain skill, such as long division. Criterion-referenced tests are designed to measure individual abilities, not to provide comparisons with other students.

Dr. Reynolds and defendants' experts also agreed that standardized tests are used in connection with important educational decisions throughout the United States. Massachusetts recently adopted a program of periodic administration of criterion-referenced tests to determine whether all students are adequately acquiring basic skills in reading, writing, and mathematics. M.G.L. c. 188 (1985). Standardized tests are also used in measuring teacher effectiveness and comparing school districts.

The Stanford Achievement Test, which has been administered by New Life since the inception of this case, is a nationally recognized norm-referenced test. According to Dr. Reynolds, it is common for a school

district to have standardized tests specially devised to complement commercially available tests to measure fully matters such as the efficiency, thoroughness and progress of an educational program.

In Dr. Reynold's view, standardized criterion and norm-referenced tests either exist or could be developed to allow East Longmeadow to determine whether students at New Life were adequately acquiring the skills and knowledge necessary to become productive workers and effective citizens. Indeed, a number of states now rely on the results of standardized tests in assessing the adequacy of the education of students attending private religious schools or being educated at home. See Alaska Stat. s 14.45.120; Ark.Stat.Ann. s 80-1503.6(3); Fla.Stat.Ann. s 232.02; La.Rev.Stat.Ann. s 17.236.1 D.(2); N.C.Gen.Stat. s 115C-549; W.Va.Code s 18-28-3.

Dr. Reynolds' conclusion that a combination of criterion and norm-referenced tests either exist or could be devised to measure whether New Life students are acquiring appropriate skills and knowledge derives in part from his view that a state's legitimate interest is in assessing what students know,

rather than where they learned.

Dr. Reynolds also testified, however, that standardized test results are the best measure of teacher effectiveness. In his view, a college degree is not an essential requirement for either elementary or secondary school teachers.

Dr. Reynolds acknowledged that integrity in the testing procedures is required for the results to have the value he ascribes to them. He believes such integrity can be attained in the testing of New Life students.

Dr. Reynolds did not contend that test results alone would always satisfy the state's interest in assuring that a child was acquiring essential skills and knowledge. If test results raised a question concerning this, one or more meetings between School Committee representatives, parents and perhaps teachers would be necessary to identify the source of the child's problem. To accomplish this, further specialized testing might be required. If this process indicated that a student or group of students were having problems because they were not being adequately taught at school, the public officials could encourage the parents to seek improved education for

their children, either by causing improvement of the child's current school or by transferring the child to another school.

Dr. Reynolds felt most parents, including most fundamentalist Christian parents, would be responsive to legitimate expressions about the adequacy of their child's education. If they were not, the state could initiate legal proceedings to compel appropriate education of the child.

Defendants presented several witnesses who testified concerning standardized testing and the sufficiency of plaintiffs' proposal for assuring that New Life students were learning adequately. Dr. Porter acknowledged that standardized test scores are a very important measurement of whether or not children are in fact being educated. Such tests are used in the East Longmeadow public schools to evaluate teaching, to improve the curriculum, and to see if the students are being taught certain subjects and developing certain skills. Dr. Porter views the purpose of education to be to impart knowledge to students. To him, standardized testing is a way to determine if this is being done.

Dr. Porter also testified that a school must have

competent teachers. With regard to teacher qualifications, Dr. Porter felt that a college degree was generally required, but that for a religious school some comparable training, not resulting in a college degree, might be acceptable for elementary school instructors. Dr. Porter himself had been taught in Catholic parochial schools by some instructors who did not have college degrees. In Dr. Porter's view, however, college educated teachers are more important now than when he was young, and indispensable for teachers in post-elementary education. He would not have recommended approval of New Life as long as it employed its staff as of March 1985, which included few teachers with college degrees.

Dr. Drinkwater testified that in his opinion every aspect of the East Longmeadow approval process described earlier would be essential to his deciding whether to recommend that the School Committee approve New Life. In view of M.G.L. c. 76, s 1, Dr. Drinkwater believes it is his job to participate in deciding whether a school should be approved. He does not believe he is required to assess the progress of individual students.

Dr. Drinkwater did acknowledge that if certain criterion-referenced tests were properly administered, they would inform him of whether the subjects tested were being taught at New Life. Moreover, he testified that if those tests were properly administered, the results would also disclose whether those subjects were being taught as efficiently and thoroughly at New Life as in the East Longmeadow public schools.[10] Periodic testing employing proper procedures would also, in Dr. Drinkwater's opinion, disclose whether students at New Life were making progress in the subjects tested which is equivalent to the progress made in those subjects by East Longmeadow public school students.

Dr. Drinkwater does not, however, believe that he could rely on standardized test results to decide whether to recommend approval of New Life. He expressed concern about the integrity of the testing

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[10]The experts testified that standardized test scores are correlated to socio-economic status. The evidence did not indicate that the students at New Life Academy have the same socio-economic background as those in East Longmeadow, which is an upper-middle class community. Thus, although M.G.L. c. 76, s 1 establishes East Longmeadow as the comparator for New Life, the experts agreed that East Longmeadow was not the benchmark they would choose to evaluate New Life.

procedures employed by New Life. He also had a more fundamental concern. To Dr. Drinkwater, an essential purpose of education is to instill in children a "thirst for knowledge" and the reasoning skills to satisfy that thirst. Dr. Drinkwater believes that to impart those qualities an instructional program must have quality, college-educated teachers and a good curriculum. In his view, the results of standardized tests do not provide the information necessary to evaluate an educational program. Thus, he believes every aspect of the previously described East Longmeadow approval process is indispensable to fulfilling East Longmeadow's statutory duty.

Dr. George Madous testified on behalf of defendants. He is an expert in school effectiveness and educational testing. Dr. Madous recognized that standardized tests are used for many important educational decisions, such as determining whether to graduate a student, whether to hire or fire a teacher, and to assess the effectiveness of public schools.

Dr. Madous, however, expressed a general concern about the reliance on tests alone in making important educational decisions. This concern is based, in part, on his view that high stakes create

incentives for a school or school system to cheat on the tests. Although he did not have any evidence of impropriety in the administration of standardized tests at New Life, he would be concerned about the integrity of its testing procedures if test results were to be used to determine whether its Academy should be approved. His concern would be satisfied, however, if an independent contractor was engaged to administer tests acceptable to the School Committee. This concern could also be addressed by having the tests administered to New Life students by representatives of the School Committee in the public schools.

Dr. Madous also expressed other concerns regarding the value of testing in the context of this case. Testing, in his view, is an ex post facto measure which would expose children to losing a period of effective learning time if the results revealed a problem with their education. Dr. Madous also noted that no standardized tests exist to measure ability in drawing, music, health education (including sex education), physical education, and citizenship, which are all subjects he considers important to the state's interest in the adequacy of a

child's education. He acknowledged, however, that appropriate standardized tests in some of these areas, including citizenship, could be devised.

Dr. Madous also testified that standardized tests could adequately measure the efficiency and thoroughness of instruction in the subjects tested. The Stanford Achievement test does this in the areas of English, reading, and arithmetic. Indeed, Dr. Madous indicated that children who performed satisfactorily on the periodic Massachusetts Basic Skills Tests, which measure reading, mathematics and writing, would be adequately progressing toward becoming productive workers and effective citizens.

In addition, Dr. Madous testified that it would be feasible, although expensive, for school officials to do individual follow-up concerning New Life children whose test results suggest problems. Dr. Madous felt that most parents, including parents whose children attend New Life, want a good education for their children. He expects that if school authorities informed New Life Academy parents that their children were doing poorly in school, they would at least seriously consider sending their children to another fundamentalist Christian school, such as First

Baptist's.

As their final witness, defendants presented the expert testimony of Dr. Kevin Ryan, a professor of education at Boston University who specializes in teacher training. Dr. Ryan expressed the view that New Life's teachers did not appear to have either the subject matter knowledge or educational training necessary to be qualified to teach. In his view, a college degree, even if not in education, is essential for a person to be minimally qualified to begin teaching. He felt that a college degree of any type would adequately evidence the exposure to subject matter and teaching technique necessary for one to teach.

Dr. Ryan testified that the East Longmeadow approval process is a reasonable means of determining whether New Life Academy should be approved. He did not, however, view each element of it as essential to determining whether instruction in the legally required subjects at New Life equals in efficiency, thoroughness, and progress to that in the East Longmeadow schools.

Dr. Ryan also testified that East Longmeadow's process was not, in his opinion, the only acceptable

means of assuring that instruction at New Life in the legally required subjects is comparable in efficiency, thoroughness and progress to instruction in East Longmeadow. In his view, it would be minimally adequate to satisfy the state's interest in the education of New Life students if the School Committee received (1) the curriculum used by New Life showing that the legally required subjects were being taught; (2) resumes of New Life teachers indicating that all had college degrees; and (3) standardized test scores showing that the students were doing at least average work in reading, writing, and arithmetic.

Dr. Ryan also expressed the belief that if public school officials told New Life parents that standardized test scores indicated their children were performing below their potential, the parents would seek to identify the difficulty and exert their influence to improve their children's educational environment.

8. The East Longmeadow Approval Process, As Applied to Plaintiffs, is Not the Least Restrictive Means of Satisfying the State's Legitimate Interest in Education.

Having considered the substance and credibility

of all of the testimony presented regarding the value of standardized testing generally and plaintiffs' proposal as most fully elaborated by Dr. Reynolds particularly, the court concludes as follows.

The defendants in this case have been attempting to perform their statutory duty under M.G.L. c. 76, s 1. They are genuinely concerned about the educational welfare of New Life students. They also have a reasonable basis to be concerned about the qualifications of at least some New Life teachers to instruct children.

Defendants have not, however, been sufficiently sensitive to plaintiffs' sincere religious objections to submitting their educational ministry for government approval. Nor, as discussed in the Conclusions of Law, have defendants recognized the limits of the legitimate state interest in the education of children and the parents' preeminent role in selecting among educational alternatives which are adequate to satisfy the state's interest. As described in the Conclusions of Law, the state's interest is in assuring that a child's education occurs in a safe and healthy environment and prepares the child to be a productive worker and effective citizen in our

democracy. To achieve this goal, Massachusetts law requires that a child attend school in a safe building until age sixteen, or about tenth grade.

Plaintiffs provide a safe school for New Life students, teach the subjects the state feels are essential, and require that New Life students attend school until at least age sixteen.

However, the testimony presented and the inferences which the court has drawn from it indicate that this case involves, in part, a clash of educational philosophies. Plaintiffs want New Life students to be educated in their own religious faith. This involves, among other things, an enduring commitment to submit to the word of God as plaintiffs understand it. As expressed most vividly by Dr. Drinkwater, defendants seem animated in part by a desire to assure that New Life students develop a "thirst for knowledge." Although not plainly stated by any witness, the court infers that this "thirst for knowledge" includes the capacity to question the submissive faith these students now share with their parents. As described in the Conclusions of Law, any effort to encourage New Life students to question the faith they share with their families exceeds the

state's legitimate interest in education.

In any event, the court concludes that standardized tests exist or could feasibly be devised to measure the efficiency, thoroughness, and progress of the learning of New Life students in the subjects they must master to become productive workers and effective citizens.

The School Committee can require that New Life students take standardized tests, selected by the School Committee, at periodic intervals. It is feasible to assure the integrity of the standardized testing process and, therefore, the reliability of the test results. If East Longmeadow does not trust New Life to administer the tests, an independent contractor may be engaged or the tests may be administered to New Life students by East Longmeadow officials in the public schools.

It is also feasible for the School Committee to acquire from New Life adequate information concerning the courses taught, the curriculum used, and the academic credentials of New Life teachers, among other things. The School Committee can also obtain the results of the standardized tests from the parents of students at New Life, if not from the

school, or directly from any testing service utilized.

It is also feasible for the School Committee to follow up individually any case in which the test results suggest that a student is not learning adequately. This follow-up could include discussions with New Life parents and, where desirable, with New Life teachers. It could also involve further testing when appropriate. This is an approach now regularly utilized with regard to children in Massachusetts who may have learning disabilities.

The court expects that New Life parents would be responsive to any problems identified by this process concerning the education offered at New Life or their child's ability to learn. They would likely respond by causing New Life to improve the education offered, transferring their child to another fundamentalist Christian school--which is a viable alternative in East Longmeadow--or by placing their child in another school equipped to address their child's educational needs. If parents do not respond in a manner satisfactory to the East Longmeadow School Committee, it may initiate civil litigation with a view to obtaining an order removing the child from his parents' custody or requiring a specific form of

education for the child.

The foregoing process may be sufficient to satisfy the state's interest in the education of New Life students. The court does, however, recognize that testing is an ex post facto measure of the adequacy of instruction. The defendants contend that the ex post facto nature of the testing process necessitates teacher qualification requirements, particularly a requirement that each teacher have a college degree.

As indicated earlier, the record at trial was not fully developed concerning the issue of whether requiring that teachers have a college degree, or other particular academic credentials indicating exposure to teaching techniques and the subject matter to be taught, is essential to assuring that students are adequately educated. It is not, however, necessary or appropriate for the court to decide now whether particular teacher credentials, in addition to the previously described program of standardized testing and individual follow-up, are necessary to satisfy the state's interest in the education of New Life. This issue should be addressed by East Longmeadow. It is possible that East Longmeadow

will receive guidance from the state government, the Massachusetts legislature, or the Supreme Judicial Court concerning this question. In any event, plaintiffs will have to respond to the School Committee's revised effort to assure that New Life students are adequately educated. This process may obviate the need for further litigation concerning a teacher credential requirement, among other things. If not, the relevant questions will be clarified and the evidentiary record may be amplified.

It is sufficient for present purposes that the court now finds that East Longmeadow has not shown that its approval process is the least restrictive means of assuring New Life students are adequately educated. Rather, the evidence demonstrates that standardized testing and individual follow-up, or such testing, follow-up and a requirement that teachers have appropriate academic credentials, would be adequate to satisfy the state's interest in the education of New Life students. Either approach imposes a lesser burden on the free exercise of plaintiffs' religious beliefs than the East Longmeadow approval process. Neither would violate the Establishment Clause of the First Amendment of the

United States Constitution.

9. The East Longmeadow Approval Process Would Result in the Excessive Entanglement of the State and Religion.

In contrast, as described in the Conclusions of Law, the East Longmeadow approval process at issue in this case would foster a constitutionally unacceptable degree of entanglement between the government and religion. Because many New Life teachers do not have college degrees, the initial approval process would require East Longmeadow representatives to make frequent visits to many classrooms to observe teaching. As all subjects are taught at New Life from a religious perspective, these visits would necessarily involve surveillance of religious as well as secular instruction.

This surveillance would not be an end in itself. In this case it is foreseeable that it would lead to suggestions for improvement of instruction, coupled with offers of public advice and assistance. It is likely that East Longmeadow would strongly suggest, if not formally require, that New Life replace many present teachers with college graduates. New Life's response to East Longmeadow's suggestions or

requirements would substantially affect whether approval of the school would be granted. If the Academy were approved, its right to retain that status would be reviewed every two years.

Cumulatively, this interaction would constitute an excessive entanglement of government and religion.

10. Summary

In summary, the court concludes that the East Longmeadow approval process at issue in this case would burden the free exercise of plaintiffs' religious beliefs in an effort to satisfy the state's compelling interest in assuring that New Life students are adequately educated. It is not, however, the least restrictive means of satisfying that compelling state interest. In addition, the East Longmeadow approval process would foster an excessive entanglement of the government and religion. The alternative means which East Longmeadow could use to assure that New Life students were being adequately educated would not foster an excessive entanglement of government with religion. Thus, for the reasons explained in the Conclusions of Law, the East Longmeadow approval process, as applied to

plaintiffs, violates the First Amendment.

III

CONCLUSIONS OF LAW

A. The Meaning of M.G.L. c. 76, s 1.

There is a threshold issue regarding the meaning of M.G.L. c. 76, s 1 which must be resolved prior to addressing whether that provision is unconstitutional as defendants have sought to apply it to plaintiffs. Plaintiffs contend that the statute does not authorize the East Longmeadow School Committee to consider the qualifications of New Life's teachers. Defendants disagree. The court concludes that M.G.L. c. 76, s 1 permits a school committee to examine the qualifications of private school teachers to instruct children, but does not require such an examination.

Plaintiffs' argument that M.G.L. c. 76, s 1 does not authorize examination of private school teacher competency relies on the language of that provision, particularly as it compares to M.G.L. c. 71, s 1, which pertains to public school teachers. M.G.L. c. 71, s 1 provides that public school teachers shall be "of competent ability and good morals." M.G.L. c. 76, s 1 does not contain a comparable requirement. Rather, M.G.L. c. 76, s 1 provides that a private

school shall be approved when the school committee is "satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town." (emphasis added).

Plaintiffs, therefore, contend that a comparison of the relevant public and private school provisions show that the drafters knew how to provide plainly for authorizing inquiry into teacher competence and did not do so in the law relating to private schools. Plaintiffs argue that M.G.L. c. 76, s 1 authorizes inquiry solely concerning "instruction"--that is, what is being taught--rather than examination of the "instructors." Plaintiffs believe this interpretation is not only compelled by the language of M.G.L. c. 76, s 1, but is consistent with the Massachusetts Supreme Judicial Court's construction of the predecessor statute to M.G.L. c. 76, s 1. With regard to that statute, the Supreme Judicial Court said, "the great object of these provisions of the statutes has been that all children shall be educated, not that they shall be educated in any particular way." *Commonwealth* v. *Roberts*, 159 Mass. 372, 374, 34 N.E. 402 (1893).

While plaintiffs' construction of M.G.L. c. 76, s

1 is arguably reasonable, it is not right. The Massachusetts Supreme Judicial Court recently addressed M.G.L. c. 76, s 1 as applied to home education[11] and, in pertinent part, construed it as follows:

> The superintendent or school committee may also examine the competency of the parents to teach the children. General Laws c. 71, s 1, provides that teachers shall be "of competent ability and good morals." While we recognize that teachers in public schools must be certified, certification would not appropriately be required for parents under a home school proposal. [citations omitted]. Nor must the parents have college or advanced academic degrees. However, the superintendent or school committee may properly inquire as to the academic credentials or other qualifications of the parent or parents who will be instructing the children.

Care and Protection of Charles & Others, 399

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[11]The Massachusetts Supreme Judicial Court has indicated that the standard for approval of home education is determined by the standard applicable to private schools: "Our reading of this statute [c. 76 s 1] indicates that the Legislature intended that the approval of a home school proposal fall within the above enunciated standard ["thoroughness and efficiency, and in the progress made therein"] for the approval of a private school." *Care and Protection of Charles & Others*, 399 Mass. at 331, 504 N.E.2d 592.

Mass. at 339, 504 N.E.2d 592 (emphasis added). This decision indicates that the highest court of Massachusetts has interpreted M.G.L. c. 76, s 1 to permit, but not to require, a school committee to consider teachers' qualifications as an indirect means of evaluating "instruction." This construction of the state statute requires deference from this court.[12] *Erie Railroads Co.* v. *Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938).

B. M.G.L. c. 76 §1 is Being Tested Only As Applied By East Longmeadow To Plaintiffs.

It is important to recognize that the court is not now addressing whether M.G.L. c. 76, s 1 is generally invalid for any reason. Rather, the sole issue being decided is whether M.G.L. c. 76, s 1 as construed and applied by East Longmeadow abridges plaintiffs'

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[12]The court notes that the decision in *Care and Protection of Charles & Others*, involved analysis of parents' rights under the Fourteenth Amendment to control the education of their children, rather than analysis of their First Amendment rights. 399 Mass. at 333, 504 N.E.2d 592. That case is also factually distinguishable in material respects from the present case. In any event, while this court defers to the Massachusetts Supreme Judicial Court in its interpretation of the meaning of M.G.L. c. 76, s 1, the decisions of the state court do not diminish this court's responsibility to analyze independently the federal First Amendment questions presented by the facts of this case. B. M.G.L. c. 76, s 1 is Being Tested Only As Applied By East Longmeadow to Plaintiffs.

freedom under the First Amendment.

At the outset of this case plaintiffs contended that M.G.L. c. 76, s 1 should be generally invalidated as unconstitutionally vague and overbroad. This contention was rejected by District Judge Rya Zobel, to whom this case was initially assigned. She concluded:

> The statute on its face does not reach a substantial amount of constitutionally protected conduct, indeed, it expressly prohibits denial of approval on account of religious teaching. Nor is the language impermissibly vague. See *Bangor Baptist [Church* v. *State of Maine*, etc., 549 F.Supp. 1208] at 1227 ("equivalent instruction" not overly vague). Plaintiffs thus have not met the test set forth for overbreadth and vagueness challenges in *Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

Braintree Baptist Temple v. *Holbrook Public Schools*, 616 F.Supp. 81, 91 (D.Mass.1984). Therefore, the question of the constitutionality of the statute generally is not now before the court and the ruling in this case in plaintiffs' favor should not suggest that the provisions of M.G.L. c. 76, s 1 will usually be found to be an unacceptable way for the state to discharge its responsibility to assure that children are

adequately educated.

However, M.G.L. c. 76, s 1, like "almost every law[,] is potentially applicable to constitutionally protected acts; that danger [does not] invalidate the law as such, but merely [invalidates] its enforcement against protected activity." L. Tribe, American Constitutional Law 711 (1978). See *United States* v. *Spock*, 416 F.2d 165, 173 n. 20 (1st Cir.1969) ("The fact that a seemingly normal criminal statute, by virtue of its prohibition of conspiracy and crime counseling, may in some instances apply to affect freedom of association or freedom of speech does not invalidate the statute. [citations omitted]. The court's obligation is, rather, to make sure that such a statute does not improperly infringe upon speech in any particular instance.").

For the reasons explained below, the court has concluded that the specific manner in which East Longmeadow has sought to apply M.G.L. c. 76, s 1 to the plaintiffs in this case violates plaintiffs' First Amendment rights. However, as the Supreme Court said in *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), "Nothing [in this decision] is intended to undermine the general

applicability of the State's compulsory school attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not [violating the First Amendment] provide for ..." assuring that the children involved in this case, and others similarly situated, are adequately educated. Id. at 236, 92 S.Ct. at 1543.

C. The Purposes of the First Amendment.

This case raises fundamental issues concerning the "wall of separation between church and state" erected by the First Amendment. Thus, it is appropriate to recognize clearly the interests intended to be protected by the First Amendment.

The First Amendment of the United States Constitution provides in part that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment extended this prohibition to state and local governments. *Cantwell* v. *Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (free exercise); *Everson* v. *Board of Education*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-12, 91 L.Ed. 711 (1947) (establishment clause).

In 1802, Thomas Jefferson wrote the Baptists of

Danbury, Connecticut referring to the First Amendment by stating that:

> [I] contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

Thomas Jefferson, Writings 510 (The Library of America ed. 1983).

Jefferson's metaphor of a wall of separation was not, however, original. Rather, it derived from the Baptist Roger Williams writing that:

> The faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the world; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the

> world, and added unto his church or garden.

Mark DeWolfe Howe, The Garden and the Wilderness 6 (1965).

Jefferson's desire for a separation of church and state was motivated primarily by a concern that in its absence religious authorities would exert improper influence on government to establish a religion, to impose their beliefs on others and otherwise unduly affect public policy. In contrast, Williams' wish for such separation was primarily motivated by a concern that the spiritual freedom of individuals and churches would be jeopardized if it was not safeguarded from the authority of government.

The framers of the First Amendment intended to serve Williams' purposes as well as Jefferson's. Thus:

> The purposes of the First Amendment ... were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion.... Religion and government, each insulated from the other, could then coexist.

Larkin v. *Grendel's Den*, 459 U.S. 116, 122, 103 S.Ct. 505, 510, 74 L.Ed.2d 297 (1982).

The interests which plaintiffs assert in this case

are plainly among those which the First Amendment's wall of separation was originally intended to protect. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 623, 91 S.Ct. 2105, 2116, 29 L.Ed.2d 745 (1971). As Justice Stanley Reed once wisely warned, however, "a rule of law should not be drawn from a figure of speech." *McCollum* v. *Board of Education*, 333 U.S. 203, 247, 68 S.Ct. 461, 482, 92 L.Ed. 649 (1948). Considerable, complex law has evolved regarding both the Free Exercise and Establishment Clauses of the First Amendment. It is, therefore, necessary to analyze, individually and in detail, the effect of each of those provisions as applied to the facts of this case.

D. The Free Exercise Clause

1. The Applicable Standards

[2] The Supreme Court has recently reaffirmed that Free Exercise claims are to be subject to "strict scrutiny." *Hobbie* v. *Unemployment Appeals Commission of Florida*, --- U.S. ----, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987). Thus, to determine whether the Free Exercise Clause is violated the court must decide:

1. Whether plaintiffs' challenge is motivated by

a sincerely held religious belief;

2. Whether plaintiffs' free exercise of religion is burdened by the challenged government action;

3. Whether the challenged government conduct serves a compelling state interest; and, if so

4. Whether the government has proven that the challenged conduct is essential to achieving, or is the least restrictive means of achieving, that compelling state interest.

Thomas v. *Review Board*, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *United States* v. *Lee*, 455 U.S. 252, 257-58, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."); Yoder, 406 U.S. at 215, 92 S.Ct. at 1533 ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

As Justice Sandra Day O'Connor has recently observed, although the Supreme Court has not been

uniform in the language it has employed in articulating the test to be applied to the free exercise claims:

> One can ... glean at least two consistent themes from the [Supreme Court's] precedents. First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "otherwise be served." These two requirements are entirely sensible in the context of an assertion of a free exercise claim. First, because the government is trying to override an interest specifically protected by the Bill of Rights, the government must show that the interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill or Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant power of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.

Goldman v. *Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 1325, 89 L.Ed.2d 478 (1986) (O'Connor, J., dissenting).

The strict scrutiny doctrine imposes a heavy burden on the government when it is required to demonstrate that it is seeking to use the least restrictive means necessary to serve a compelling state interest. *United States* v. *Lee*, 455 U.S. at 262, 102 S.Ct. at 1057-58 (Stevens, J., concurring in judgment.) (Supreme Court's formulation of the constitutional standard "suggests that the Government always bears a heavy burden of justifying the application of neutral laws to individual conscientious objectors."); *Callahan* v. *Woods*, 736 F.2d 1269, 1272 (9th Cir.1984) ("The government must shoulder a heavy burden to defend a regulation affecting religious actions.").

In addition, it should be recognized that strict scrutiny is not properly characterized as a balancing test. In the context of this case, strict scrutiny means that when the government's effort to serve a compelling state interest burdens the free exercise of religion, the state must prove it is employing the least restrictive means of achieving its goal. *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432; *Lee*, 455 U.S. 252, 102 S.Ct. 1051. In addressing the discrete question of whether a state is using the least restrictive means

to serve its purposes, the court is not called upon to balance its perception of the weight of the burden on an individual's religious belief against its assessment of the importance of the competing state interest or the possible cost of non-compliance with the state's program.[13] Balancing necessarily entails particularly subjective judgments. Strict scrutiny makes the decisive question the more objective issue of whether the state is employing the least restrictive means of satisfying its interest.

Strict scrutiny analysis serves an important purpose of the First Amendment which could be subtly but significantly threatened if a true balancing test was to be applied to resolve free exercise claims. As Justice William Brennan has written:

A critical function of the Religion Clause of the

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[13]The court recognizes that some language in *Yoder* suggests that a balancing approach may be applicable to First Amendment claims. 406 U.S. at 214, 92 S.Ct. at 1532. ("[A] State's interest in universal education is not totally free from a balancing process when it impinges on fundamental rights and interests ... specifically protected by the Free Exercise Clause of the First Amendment."). The evolution of the law since *Yoder*, however, particularly the formulation of the relevant questions in *Thomas* and *Lee* and the statement in *Hobbie* that strict scrutiny is required in free exercise cases, persuades this court that a balancing of competing interests is not now permitted in deciding free exercise issues such as those presented by this case.

> First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant because unfamiliar. It is the constitutional role of [the courts] to ensure that this purpose is realized.

Goldman v. *Weinberger*, 106 S.Ct. at 1321-22 (Brennan, J., dissenting).

The judicial process, however, is also in meaningful measure a majoritarian social institution. Decisions in free exercise cases may be rendered by juries composed of representatives of the community. When, as in this case, a jury is waived and a free exercise claim is tried only to a judge, the risks to which Justice Brennan referred do not disappear. Judges tend to be chosen from the mainstream of the community. They too may be prone to confuse the familiar with the important. In the process, if directed to balance interests which must be subjectively weighed, judges may improperly deny the protections of the First Amendment to the perhaps peculiar minorities which need them most. Strict scrutiny analysis reduces this risk.

Thus, it is important to reiterate that the court is not authorized to balance its perception of the

burden on the exercise of plaintiffs' religious beliefs against its assessment of the importance of the state's competing interest to determine who should prevail in this case. Rather, as will be explained, plaintiffs have shown that East Longmeadow's approval process burdens the free exercise of their sincere religious beliefs. East Longmeadow has shown that its approval process seeks to serve a compelling state interest. The critical question, therefore, is whether East Longmeadow has shown that its approval process is the least restrictive means of assuring that the children who attend New Life Academy are adequately educated. The defendants have failed to make this showing. To the contrary, the evidence indicates that there are adequate legal means of achieving the state's interest in a manner which will not impermissibly burden the free exercise of plaintiffs' religious beliefs. Thus, East Longmeadow's approval process, as applied to plaintiffs, violates the Free Exercise Clause.

2. Plaintiffs' Challenge is Motivated By Their Sincerely Held Religious Beliefs.

As explained fully in the Findings of Fact, the court has concluded that plaintiffs' challenge to the

East Longmeadow approval process is primarily motivated by their sincerely held religious beliefs. Plaintiffs' religion does not permit them to recognize the authority of the state to control aspects of New Life's educational ministry. Thus, plaintiffs truly believe it would be a sin to seek or accept approval of the state for New Life's educational ministry. For the same reasons, although they have no religious objection to hiring college-trained teachers who meet their other criteria, plaintiffs have a religious objection to being directed to do so by the government. These sincere religious concerns have caused plaintiffs to challenge East Longmeadow's approval process.

3. East Longmeadow's Approval Process Burdens the Free Exercise of Plaintiff's Religious Beliefs.

As the Supreme Court stated in Thomas:

> Where the state conditions receipt of an important benefit on conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18, 101 S.Ct. at 1432, quoted in *Hobbie*, 107 S.Ct. at 1049; see also *Hernandez* v. *Commissioner of Internal Revenue*, 819 F.2d 1212, 1221 (1st Cir.1987). The Supreme Court has also recognized that the burden upon the free exercise of religious belief is particularly great where the individual is confronted with a choice between respecting his religious convictions and risking criminal prosecution. *Yoder*, 406 U.S. at 218, 92 S.Ct. at 1534 ("The impact of the compulsory-attendance law on respondent's practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.").

In this case, the plaintiffs believe that it would be a sin to seek or accept approval from the state for New Life's educational ministry. East Longmeadow, however, has pursuant to M.G.L. c. 76, s 1 required that New Life Academy request and obtain approval. New Life parents now face the prospect of criminal prosecution if they continue to send their children to the Academy. This puts pressure on plaintiffs to seek approval, in violation of

their beliefs, and thus run the risk of divine retribution. Therefore, M.G.L. c. 76, s 1, as applied by East Longmeadow, burdens plaintiffs' free exercise of religion.

Defendants contest this conclusion, however. They claim that while plaintiffs have a religious belief against approval by civil government, they have failed to show how the East Longmeadow approval process burdens the free exercise of their religion because they do not have a religious objection to any of the specific criteria which East Longmeadow seeks to employ in deciding whether to approve the school. See Attorney General's and East Longmeadow's Post-Trial Memorandum, 6-10.

Defendants' contention regarding the burden on the exercise of plaintiffs' beliefs is incorrect. It has long been recognized that there is a significant burden imposed by official actions which compel an individual to acknowledge the authority of the state when it is contrary to his convictions to do so. In 1942, the Supreme Court declared unconstitutional compulsory flag salute laws because it found that absent a clear and present danger, nobody--whether religiously motivated or not--should be coerced

against his will to affirm a belief in the form or authority of our government. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 1183, 87 L.Ed. 1628 (1943).

The particular burden which compelled acknowledgment of the authority the state can impose on the exercise of religious belief was familiar to the framers of the First Amendment. As was well-known when the First Amendment was adopted, "[e]arly Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority." *Barnette*, 319 U.S. at 633 n. 13, 63 S.Ct. at 1183 n. 13. Similarly, the Jewish festival of Purim then celebrated the triumph over persecution triggered by one Jew's unwillingness to bow to a Persian king's counselor because the Jewish people worshipped only God.

In addition, the framers were well aware of more contemporary illustrations of the issue. When the First Amendment was enacted, Sir Thomas More (later to become St., Thomas More) had already achieved recognition as a martyr for his refusal on religious grounds in 1535 to recognize the supremacy

of the King of England over the Pope. Donald Thomas, Editor, "Sir Thomas More," in State Trials, Volume 1 at 34 (Routledge & Kegnan Paul 1972). As the framers also knew, in America, "the Quakers, William Penn included, [had] suffered punishment rather than uncover their heads in deference to any civil authority." Barnette, 319 U.S. at 633 n. 13, 63 S.Ct. at 1183 n. 13. These facts reinforce the conclusion that the East Longmeadow approval process imposes a burden on the free exercise of plaintiffs' religion within the meaning of the First Amendment.

Defendants also suggest that the court disregard the fact that East Longmeadow for several years insisted that New Life seek approval. As explained in the Findings of Fact, at trial Dr. Drinkwater indicated that if a private school like New Life fully participated in the approval process, but had a religious objection to saying that it was seeking or accepting approval, he would no longer recommend that it be required to state that it was seeking or accepting approval. Based upon this testimony, defendants suggest that the court should regard the requirement that plaintiffs seek approval as moot, or

no longer relevant. See Attorney General's and East Longmeadow's Post-Trial Memorandum at 4.

Defendants' suggestion is tempting because courts should not decide constitutional issues if it is not necessary to do so. *Coffman* v. *Breeze Corps, Inc.*, 323 U.S. 316, 324-25, 65 S.Ct. 298, 303, 89 L.Ed. 264 (1945). In this case, however, it would be inappropriate to adopt defendants' suggestion for several compelling reasons.

As a general rule:

> A defendant cannot ordinarily moot a plaintiff's claim by voluntarily ceasing allegedly unlawful conduct. Such acquiescence would necessarily be without effect if plaintiff is seeking damages for past wrongs. But even an action for injunction, or for other relief with continuing force, is not rendered moot by the voluntary cessation of allegedly illegal conduct, since a "defendant is free to return to his old ways," and since there is "a public interest in having the legality of the practices settled...." However, in the event of voluntary cessation, a "case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Tribe, American Constitutional Law s 3-14 at 67 (footnotes omitted.)

In the instant case, East Longmeadow insisted

for several years that New Life request approval. Plaintiffs are seeking money damages for past wrongs, as well as prospective relief. Thus, the legality of East Longmeadow's conduct must be resolved.

In addition, it is not certain that Dr. Drinkwater's suggestion at trial represents an alteration of the official East Longmeadow policy regarding approval. Nor is it clear that, absent a decision in this case, East Longmeadow would not reinstitute its approval requirements in the future.

Because the issue presented by this case might recur in communities throughout the Commonwealth of Massachusetts, there is a particular "public interest in having the legality of the practices settled." Id.; see also *United States* v. *W.T. Grant*, 345 U.S. 629, 632-633, 73 S.Ct. 894, 897-98, 97 L.Ed. 1303 (1953); *Sanchez-Mariani* v. *Ellingwood*, 691 F.2d 592, 595 (1st Cir.1982). Indeed, the City of Boston is deferring enforcement of the truancy laws against certain Braintree Temple Academy parents pending the guidance to be provided by the final adjudication of this case. See supra note 4.

There is another aspect of the public interest which influences the court not to ignore East

Longmeadow's prior insistence that New Life seek approval. The Supreme Court has made it clear that when confronted with sincere religious objections, public officials must adopt the least restrictive means of achieving the compelling state interest they seek to serve. It is vital that such officials understand that they have this obligation and that they take it seriously from the outset, rather than belatedly recognizing it in the midst of trial. It is expensive and arduous to initiate a case and to bring it to trial. Plaintiffs in this case have done so, but many similarly situated might not. Rather, potential plaintiffs unable or unwilling to sue might suffer serious injury to their freedom of religion because local officials have not recognized and responded to their constitutional duty to minimize the burden which their actions impose on that freedom. This case should serve as a reminder of the continuing relevance of Justice Robert Jackson's observation that:

> The [Constitution] protects the citizens against the State itself and all of its creatures--Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of

> Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to ... teach youth to discount important principles as mere platitudes.
> Such boards are numerous and their territorial jurisdiction is often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.... There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond the reach of the Constitution. *Barnette*, 319 U.S. at 637-38, 63 S.Ct. at 1185.

In addition, Dr. Drinkwater's suggestion that New Life might be allowed to provide all of the information requested so the School Committee could decide whether to approve the Academy, without requiring New Life to say it is seeking approval, would not necessarily eliminate the free exercise clause claim in this case, or eliminate the Establishment Clause issues presented. The record was not fully developed on the effect this modification by East Longmeadow would have on plaintiffs because the question emerged at trial after plaintiffs had testified. The court hopes that the parties will fully explore whether Dr. Drinkwater's

proposal would eliminate any or all of the burden which the approval process places on plaintiffs' free exercise of religion. This, however, remains uncertain.[14]

In addition, assuming that Dr. Drinkwater's proposal liminates the burden on the exercise of plaintiffs' religious beliefs created by the requirement that they request and accept approval, it would probably not eliminate completely the burden imposed by the state on plaintiffs. It is foreseeable that East Longmeadow would refuse to approve New Life Academy because so many of its teachers are not college-educated. Rather, East Longmeadow would attempt to require that New Life hire additional college-trained teachers. Although

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[14]Defendants contend that in *Bowen* v. *Roy*, 476 U.S. 693, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986), the Supreme Court has found that private parties may not invoke the Free Exercise Clause to prohibit the state from using information concerning them. This is true. *Bowen*, 476 U.S. at ----, 106 S.Ct. at 2152, 90 L.Ed.2d at 745 ("The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."). Nevertheless, if as events evolve plaintiffs contend and establish that furnishing required information for use by East Longmeadow in deciding whether to approve New Life burdens the free exercise of their religion, the government's need for that information will be subject to strict scrutiny. *Hobbie*, 107 S.Ct. at 1049.

plaintiffs have no religious objection to employing college-trained teachers, they do have a religious objection to being told by the state whom they can employ. Thus, such a requirement would burden plaintiffs' free exercise rights, although not necessarily impermissibly.

For the foregoing reasons, the plaintiffs have shown that the East Longmeadow approval process burdens the free exercise of their sincere religious beliefs.

This conclusion is not qualified because New Life sought government approval for its building in connection with complying with building and fire codes, changed its academic year to 180 days to comply with state law, and sought incorporation of the church under state law. These arguable inconsistencies regarding approval reflect distinctions plaintiffs sincerely make in the application of their religious beliefs. That is sufficient. See *Thomas*, 450 U.S. at 706, 101 S.Ct. at 1425 ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.").

Similarly, the burden on plaintiffs is not

diminished by the fact that some born again Christians do not object to seeking approval for their schools when, as here, plaintiffs do object based upon their religion as they understand it. As the Supreme Court has said:

> Intrafaith differences of [this] kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion clauses.... [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect ... [I]t is not within the judicial function and judicial competence to inquire whether [plaintiffs] or [others] more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16, 101 S.Ct. at 1430-31. Indeed, such differences are particularly likely where, as here, the religious denomination has a congregationalist structure which permits different churches to decide some matters of faith for themselves.

Finally, the fact that plaintiffs as born again Christians may not be part of a movement as long established as, for example, the Amish is not material. Rather, it is the sincerity of their religious beliefs which is relevant. See *Hobbie*, 107 S.Ct. at

1051 ("The timing of *Hobbie's* conversion is immaterial to our determination that her free exercise rights have been burdened ...").

4. Education Is a Compelling Interest.

As indicated earlier, "The mere fact that [plaintiffs'] religious practice is burdened by state action does not mean that an exemption must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432.

Education constitutes a compelling state interest. As the Supreme Court stated in *Brown* v. *Board of Education*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.

347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954). See also *Yoder*, 406 U.S. at 213, 63 S.Ct. at 1532 ("Providing public schools ranks at the apex of the function of a State"); *Meyer* v. *Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923)

(The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.").

It is necessary, however, to define with some care the degree of education required to serve the state's compelling interest. This is necessary to determine whether that interest will be substantially harmed if East Longmeadow is enjoined from utilizing the approval process at issue in this case. A careful focus is especially important in this case, for it, like *Yoder*, "calls into question traditional concepts of parental control over the religious upbringing and education of their minor children...." 406 U.S. at 231, 63 S.Ct. at 1541.

With regard to the state's compelling interest in education, the Supreme Court said in *Yoder*:

> [A]s Thomas Jefferson pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.

Id. at 221, 63 S.Ct. at 1536. More recently, the Supreme Court has reiterated that the twin goals of

education are to inculcate the skills and values necessary to maintain our democratic system and to provide "the basic skills by which individuals might lead economically productive lives to the benefit of us all." *Plyler* v. *Doe*, 457 U.S. 202, 221, 102 S.Ct. 2382, 2397, 72 L.Ed.2d 786 (1982).

In *Yoder* and *Plyler* the Supreme Court indicated that it is "basic education" imparting "basic skills" in which the state is legitimately interested. As the Supreme Court elaborated in *Yoder*, "When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate that he had in mind compulsory education through any fixed age beyond a basic education." *Yoder*, 406 U.S. at 225, 63 S.Ct. at 1538. Rather, "[s]o far as the mass of people were concerned, [Jefferson] envisaged that a basic education in the 'three Rs' would sufficiently meet the interests of the State." Id. at 226 n. 14, 63 S.Ct. at 1538 n. 14.

Although our society has become much more complex since Jefferson's time, and education in the three Rs alone may be insufficient, the state's legitimate interest remains in "basic education."

Indeed, Massachusetts seems to recognize this by only requiring that children attend school until age sixteen--that is only to the tenth grade at most.[15]

As described in the Findings of Fact, this case involves, in part, a clash of educational philosophies between plaintiffs and defendants, all of whom are concerned about the future of the children at issue. Plaintiffs want the children educated in their own religious faith. This entails, among other things, an enduring commitment to submit to the word of God as they understand it. Defendants seem motivated in part by a desire to assure that New Life students develop what Dr. Drinkwater called a "thirst for knowledge." Counsel characterized this as an "ability

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[15]Defendants contend that the Massachusetts Constitution and the state's "high-tech economy" demonstrate that Massachusetts has an interest in seeing that its children receive more than a "basic education." This contention, if correct, would cause an individual's First Amendment rights to vary from state to state. As a particular state's interest in education increased, the federal constitutional free exercise right would diminish. The court does not concur in this contention. Rather, given the fundamental nature of an individual's First Amendment rights, the court concludes they are as a matter of law the same in Massachusetts as in any other state. In any event, the court does not find the Massachusetts Constitution to establish an interest in education different or greater than that recognized by the Supreme Court. Nor have defendants proven that there are relevant, distinctive features of the Massachusetts economy.

to engage in independent thinking." Attorney General's and East Longmeadow's Post-Trial Memorandum at 14. The court infers that one element of this "thirst for knowledge" or "ability to engage in independent thinking" is the capacity to question the faith which New Life children share with their parents. Thus, although not as plainly expressed as in *Yoder*, this case also presents the question of whether it is legitimate for the state to require that children be educated to assure that they can, and likely will, make an intelligent choice between submitting to their parents' religious beliefs or selecting a more conventional, secular style of life. See *Yoder*, 406 U.S. at 232, 63 S.Ct. at 1541-42.

Defendants' concern is understandable. It has been shared by at least several Justices of the Supreme Court. See *Yoder*, 406 U.S. at 240, 63 S.Ct. at 1545 (White, J., concurring) ("A State has a legitimate interest ... in seeking to prepare [children] for the life style that they may later choose, or at least provide them with an option other than the life they have led in the past."); Id. at 245-46, 63 S.Ct. at 1548 (Douglas, J., dissenting in part) ("If [a child] is harnessed to the Amish way of life by those in

authority over him and if his education is truncated, his entire life may be stunted and deformed.").

However, when, as here, there is no conflict between the desires of parents and those of their children, the Supreme Court has held that the state is not empowered as parens patriae to save a child from himself or his parents by requiring more than a basic secular education. *Yoder*, 406 U.S. at 232, 63 S.Ct. at 1541. This decision rests on the recognition that a contrary conclusion would mean that "the State [would] in large measure influence, if not determine, the religious future of the child." Id. Such a result would be inconsistent with "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." Id.

"The [Supreme] Court has frequently emphasized the importance of the family." *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). A vital element of this is the "primary role of the parents in the upbringing of their children [which] is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232, 63 S.Ct. at 1541-42. This role derives from the

fundamental principle that " 'The child is not the creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations.' " Id. at 233, 63 S.Ct. at 1542 (quoting *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925)). See also *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

Therefore, when, as here, a free exercise claim is combined with the interest of parenthood, the government must make a distinct showing that the state action in question is necessary. *Yoder*, 406 U.S. at 233, 63 S.Ct. at 1542.

More specifically, when the power of the parent is linked to a free exercise claim, it may be subject to limitation only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Id. at 234, 63 S.Ct. at 1542.

This case does not present an issue of whether the health or safety of children who attend New Life is in jeopardy. It is not. The plaintiffs care deeply for the children's health and safety and the New Life building meets Massachusetts health and safety code requirements.

Thus, the remaining and decisive issue is whether East Longmeadow's approval process is the least restrictive means of assuring that the students who attend New Life are being adequately educated "to be self-supporting [and] to discharge the duties and responsibilities of citizenship...." Id. As explained below, it is not.

5. The East Longmeadow Approval Process Is Not The Least Restrictive Means of Assuring That New Life Students Are Adequately Educated.

In the circumstances of this case defendants must show that the East Longmeadow approval process is the least restrictive means of assuring that New Life students are adequately educated. *Thomas*, 450 U.S. at 718, 101 S.Ct. at 1432. This is a question which, once again, does not require or permit the court to balance its perception of the burden placed by the East Longmeadow approval

process on plaintiffs' free exercise of religion against its perception of the importance of education.

The Court of Appeals for the Ninth Circuit has explained this, stating:

> The purpose of almost any law can be traced to a fundamental concern of government. Balancing an individual's religious interest against such a concern will inevitably make the former look unimportant. It is therefore the "least restrictive means" inquiry which is the critical aspect of the free exercise analysis. This prong forces us to measure the importance of a regulation by ascertaining the marginal benefit of applying it to all individuals, rather than to all individuals except those holding a conflicting religious conviction.... If the compelling State goal can be accomplished despite the exemption of a particular individual, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest.

Callahan v. *Woods*, 736 F.2d at 1272. At this point in the analysis there is a heavy burden on the defendants. Id.

In this case, the defendants have not satisfied their burden of showing that the East Longmeadow approval process is the least restrictive means of assuring that East Longmeadow students will be adequately educated. To the contrary, the evidence shows that there is a less burdensome means of

achieving that compelling state interest. Thus, the East Longmeadow approval process is not essential. Therefore, it is not in this case permissible. *Lee*, 455 U.S. at 257-58, 102 S.Ct. at 1055.

The facts on which this conclusion rests are described fully in the Findings of Fact. To reiterate briefly, the court is persuaded that (1) providing basic information concerning the students, school and curriculum and (2) either standardized testing combined with individual follow-up when indicated, or (3) such testing and follow-up combined with a requirement that each teacher have appropriate academic credentials is less restrictive than the East Longmeadow approval process and sufficient to assure that New Life students are adequately educated.

Standardized tests either exist or can be devised to measure whether New Life students are receiving the education necessary to satisfy the state's legitimate interests. There are also feasible means of assuring the integrity of the testing process and the test results.

Substantial reliance on standardized testing in the context of this case would be consistent with the

practice of educators in Massachusetts and elsewhere of giving significant weight to such tests in making a variety of "high stakes" educational decisions. A number of states, including Alaska, Arkansas, Florida, Louisiana, and North Carolina, now rely on the results of standardized tests in assessing the adequacy of education of students attending private religious schools or being educated at home. See Alaska Stat s 14.45.120; Ark.Stat.Ann. s 80-1503.6(3); Fla.Stat.Ann. s 232.02; La.Rev.Stat.Ann. s 17.236.1 D.(2); N.C.Gen.Stat. s 115C-549; W.Va.Code s 18-28-3. This is relevant evidence regarding whether Massachusetts could reasonably rely in meaningful measure on the results of such tests. See *Yoder*, 406 U.S. at 226 n. 14, 63 S.Ct. at 1538 n. 14. (In deciding whether the Amish in Wisconsin must be exempted from compulsory education beyond the eighth grade, the Supreme Court relied, in part, on its finding that "an eighth grade education fully satisfies the educational requirements of at least six States.").

In addition, although only addressing the Establishment Clause issues presented by standardized testing, the Supreme Court has indicated that

standardized testing is a reasonable means of ensuring that minimum standards of instruction are met by private religious schools. *Wolman* v. *Walter*, 433 U.S. 229, 240, 97 S.Ct. 2593, 2601, 53 L.Ed.2d 714 (1977); *Committee for Public Religious Liberty* v. *Regan*, 444 U.S. 646, 653-54, 100 S.Ct. 840, 846, 63 L.Ed.2d 94 (1980). See also *Sheridan Road Baptist* v. *Department of Education*, 396 N.W.2d 373, 420 (S.Ct.Mich.1986) (Riley, J., dissenting).

Indeed, Dr. Drinkwater acknowledged that if certain standardized tests were properly administered, the results would inform him of whether the subjects tested were being taught at New Life, whether they were being taught as efficiently and thoroughly at New Life as in the East Longmeadow public schools, and whether New Life students were progressing adequately in those subjects. These are, of course, the criteria embodied in M.G.L. c. 76, s 1.

Dr. Drinkwater maintained, however, that approval of New Life is required by the statute. He believes standardized test results would not provide him with all of the information required to decide whether to recommend approval. The court finds, however, that Dr. Drinkwater's requirements for

possible approval exceed the state's legitimate interest in education, even as expressed in M.G.L. c. 76, s 1.

Defendants also object to substantial reliance on standardized test results because while such scores may reveal what a student knows, they will not disclose where he learned it. Scores might, therefore, mask possible inadequacies in instruction at New Life. The State's legitimate interest, however, is in the student. Focusing on the school may ordinarily be a reasonable, efficient and permissible means of satisfying that interest. Plaintiffs' religious objections to seeking approval make focusing on the school rather than the student a burden on the free exercise of religion in this case. This is not a necessary burden. East Longmeadow can, and therefore must, focus directly on what each student knows and not where he learned it. The state's interest remains in assuring that "all children shall be educated, not that they shall be educated in any particular way." *Roberts*, 159 Mass. at 374, 34 N.E. 402.

As explained in the Findings of Fact, it is feasible for East Longmeadow to follow up in individual cases where the standardized test results it receives suggest that a New Life student is not

learning adequately. This follow-up could include discussions with New Life parents and teachers and further testing where indicated. This is a process now pursued in Massachusetts with regard to children who may have learning disabilities.

Once again, the court expects that New Life parents will be responsive to legitimate concerns identified by this process and act to improve their children's education. If parents do not respond in a manner satisfactory to East Longmeadow, it may initiate civil litigation with a view to obtaining an order removing the child from his parents or requiring a specific form of education for the child. *See Care and Protection of Charles & Others*, 399 Mass. at 329, 504 N.E.2d 592.

Defendants also object to relying substantially on test scores because testing is an ex post facto means of identifying educational problems. Thus a child might lose a meaningful period of learning before difficulties are disclosed. East Longmeadow's approval process, however, also has an ex post facto element because the initial review would take at least two years to complete. Nevertheless, East Longmeadow's concern is reasonable. In the view of

defendant's expert, Dr. Ryan, a requirement that New Life teachers have a college degree, linked with standardized testing and appropriate follow-up, would address this concern and satisfy the state's interest in the education of New Life students.

Although some witnesses who preceded Dr. Ryan testified briefly on the importance of teachers having college degrees or other academic credentials indicating preparation to teach, the record was not fully developed on this issue. Also, as indicated earlier, since the trial of this case, the Massachusetts Supreme Judicial Court has found that approval of home education should be subject to the same standards as private school approval and has decided that with regard to approving home education, the State may inquire into academic credentials, but not require that parents who teach have college degrees. Id. at 331, 339, 504 N.E.2d 592. This suggests that a college degree would be sufficient to establish teacher competency, but that lesser credentials indicating exposure to teaching techniques and relevant subject matter would also be adequate.

It is not necessary or appropriate for this court to decide now whether requiring certain academic

credentials in addition to standardized testing and individual follow-up is a component of the least restrictive means for the state to assure that New Life students are adequately educated. The court is persuaded that either tests and follow-up, or such tests, follow-up and an appropriate academic credential requirement, would provide the necessary assurances. Each of these alternatives is a less restrictive means of satisfying the state's interest in the education of New Life students than the East Longmeadow approval process.

In addition, for reasons described in the Establishment Clause analysis which follows, applying one of these alternatives to plaintiffs in place of the approval of New Life contemplated by M.G.L. c. 76, s 1 would not violate the Establishment Clause, largely because either alternative could be implemented by a review of records rather than by the intensive surveillance, subjective evaluations, and subsequent requirements for reform which are the most entangling aspects of the East Longmeadow approval process.

In view of the foregoing, the East Longmeadow approval process as applied to New Life violates the

Free Exercise Clause.[16]

E. The Establishment Clause

[3] The Supreme Court has articulated a three part test for determining whether a statute violates the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an 'excessive government entanglement with religion.' " *Lemon* v. *Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). Like the analysis required under the Free Exercise Clause, this Establishment Clause test does not authorize a balancing of competing interests. Rather, if a program violates any one of the Establishment Clause prongs the court must strike the

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[16]As the individual plaintiffs have adequately represented their interests and demonstrated an unwarranted burden on their free exercise rights, it is not necessary for the court to address or decide the apparently unsettled issues of whether New Life as an organization itself has free exercise rights or whether it has standing to assert the free exercise rights of its members as their representative. See "*Developments in the Law–Religion and the State*," 100 Harv.L.Rev. 1605, 1743 (1987). As indicated in the Findings of Fact, however, it does appear that by burdening the free exercise of religion of present and potential members of New Life, the East Longmeadow approval process has injured the viability of the fledgling New Life church.

program down.

The *Lemon* test provides guidelines, rather than a precise formula, for identifying instances in which the objectives of the Establishment Clause have been impaired. *Meek* v. *Pittenger*, 421 U.S. 349, 359, 95 S.Ct. 1753, 1760, 44 L.Ed.2d 217 (1975). The Supreme Court has, however:

> particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic.

Grand Rapid School District v. *Ball*, 473 U.S. 373, 105 S.Ct. 3216, 3223, 87 L.Ed.2d 267 (1985).

In this case, the court is satisfied that M.G.L. c. 76, s 1 has a secular legislative purpose and its primary effect neither advances nor inhibits religion. However, the statute as East Longmeadow has sought to apply it to plaintiffs involves an excessive entanglement with religion. Thus, it violates the Establishment Clause.

The first prong of the *Lemon* test is usually satisfied "when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller* v. *Allen*, 463 U.S. 388, 394-95, 103 S.Ct. 3062, 3067, 77 L.Ed.2d 721 (1983). In this case it is evident that M.G.L. c. 76, s 1 is, in pertinent part, intended to assure that children who attend private schools are adequately educated. This is a well recognized secular purpose. See, e.g., *Mueller*, 463 U.S. at 395, 103 S.Ct. at 3067; *Committee for Public Education* 444 U.S. at 653-54, 100 S.Ct. at 846 (1980). This obvious purpose is also a sincere purpose and not a sham. See *Edwards* v. *Aguillard*, --- U.S. ----, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

Similarly, M.G.L. c. 76, s 1 does not have the principal or primary effect of either advancing or inhibiting religion. The statute establishes requirements for all children. The requirement that a private school be approved is equally applicable to religious and secular private schools. See *Mueller*,

463 U.S. at 397, 103 S.Ct. at 3068 ("Most importantly the [tax] deduction is available for educational expenses incurred by all parents, including those whose children attend non-sectarian private schools or sectarian private schools."). In addition, the statute plainly provides that approval shall not be withheld "on account of religious teaching." Thus, M.G.L. c. 76, s 1 on its face satisfies the second prong of the *Lemon* test. No evidence was introduced to contradict this conclusion.

However, M.G.L. c. 76, s 1, as East Longmeadow has sought to apply it to plaintiffs, does not satisfy the third part of the *Lemon* test because it would result in an "excessive entanglement" of the state and religion. This prong of the test is directed at one of the "main evils against which the Establishment Clause was intended to afford protection ... 'active involvement of the sovereign in religious activity.' " *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111 (quoting *Walz* v. *Tax Commissioner*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970)).

It is recognized that "total separation [of church and state] is not possible in an absolute sense." *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112. Rather,

"[s]ome limited and incidental entanglement between church and state authority is inevitable in a complex modern society." *Larkin*, 459 U.S. at 123, 103 S.Ct. at 510. The line between inevitable, incidental entanglement and excessive entanglement is "blurred" and judgments must be made based on "all of the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112. More specifically, the court "must look at several factors: the character and purpose of the institution affected, the nature of the activity engaged in by the government, and the resulting relationship between government and the religious organization." *Universidad Central De Bayamon* v. *National Labor Relations Board*, 793 F.2d 383, 385 (1st Cir.1985). Consideration of these factors indicates that this case involves characteristics commonly found to constitute excessive entanglement.

With regard to the nature of the institution affected, it is undisputed that at New Life, as in the school in *Lemon*, "religious authority necessarily pervades the school." *Lemon*, 403 U.S. at 617, 91 S.Ct. at 2113; compare *Universidad*, 793 F.2d at 385-88. The thoroughly religious nature of New Life heightens the potential for excessive entanglement in

this case.

With regard to the nature of the government activity at issue, the Supreme Court has indicated that the clearest form of excessive entanglement is a program involving a "comprehensive ... continuing state surveillance" of a religious institution, particularly a religious school. *Lemon*, 403 U.S. at 619, 91 S.Ct. at 2114. In a series of cases involving the funding of secular education in religious schools, the Court held that where regular on site inspection of teachers would be necessary to protect the state's interest in assuring that its aid was being used for secular and not sectarian purposes, there would be an excessive entanglement of church and state. See *Aguilar* v. *Felton*, 473 U.S. 402, 105 S.Ct. 3232, 3258, 87 L.Ed.2d 290 (1985) (on site inspection of public school instructors providing remedial instruction and clinical guidance services in private schools to assure that teachers are providing secular and not sectarian education creates excessive entanglement); *Meek*, 421 U.S. at 349, 95 S.Ct. at 1755 (excessive entanglement because on site surveillance of teachers would be necessary for Pennsylvania to be sure remedial and accelerated instruction and guidance counseling and

testing by public school employees in private schools did not advance religious mission of school); *Lemon*, 403 U.S. 602, 91 S.Ct. at 2107.

The Supreme Court's considerable concern for whether a relationship involves continuing surveillance is not, however, limited to direct aid cases. See *Walz* v. *Tax Commissioner*, 397 U.S. 664, 675, 90 S.Ct. 1409, 1414, 25 L.Ed.2d 697 (1970) (tax exemption for property owned by religious organization does not violate Establishment Clause in part because it does not involve continuing surveillance); see also *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir.1979) (statute empowering public official to regulate private school costs unconstitutional in part because it entails continuing involvement calling for official surveillance of religious schools).

The constitutional concerns inherent in the continuing surveillance of a religious institution are compounded when this involvement is not an end in itself, but is part of a regulatory scheme likely to lead to official efforts to alter the operations of that institution. Id. at 75; see also *Lemon*, 403 U.S. at 621, 91 S.Ct. at 2115 (Court found "no basis for predicting that comprehensive measures of

surveillance and controls will not follow"). In this case it is the synergy of the likely continuing surveillance of teaching and the resulting relationship between the School Committee and New Life which causes the court to conclude that East Longmeadow's approval process involves "excessive" entanglement between the state and a religious institution.

East Longmeadow's approval process would not require public school officials to be at New Life every day. Thus, the process is not in this respect as entangling as the programs for monitoring remedial secular education found unconstitutional in *Aguilar* and *Meek*. As described in the Findings of Fact, however, because New Life employs many teachers without college degrees, East Longmeadow officials would in the course of the approval process go into classrooms frequently to observe teaching.

The observation of teaching would not be limited to surveillance of secular instruction. New Life regards the secular and religious aspects of education as inseparable. All subjects are taught from a biblical and fundamentalist Christian

perspective.[17] Thus, religious as well as secular instruction would be under surveillance. The teachers being observed would be evaluated by the School Committee. Inherent in this process is the risk that the public officials would in their evaluations, consciously or unconsciously, be influenced by the religious message as well as by the talents of the messenger.

After observing New Life teaching, the School Committee would suggest improvements it deems necessary in New Life's instructional program and offer assistance in achieving them. The School Committee's decision whether to approve New Life would depend in part on the school's response to its suggestions. Thus, these suggestions are likely to be, in effect, requirements.

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[17] "Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?' " *Lemon*, 403 U.S. at 635, 81 S.Ct. at 2122, (Douglas, J., concurring), (quoting Reverend Joseph H. Fichter Parochial School: A Sociological Study 86 (1958)).

It is foreseeable that the School Committee would, either expressly or as a practical matter, require that New Life replace at least some of its teachers with better educated individuals. This would intimately involve the state in the church's educational ministry. The Supreme Court has recognized the "critical and unique role of the teacher in fulfilling the mission of a church- operated school." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501, 99 S.Ct. 1313, 1319, 59 L.Ed.2d 533 (1979); see also *Universidad*, 793 F.2d at 385.

In *Lemon* and its progeny, the "key role" played by teachers in religious elementary and secondary schools was "the predicate for [the Court's] conclusions" that governmental aid to such schools creates an impermissible entanglement between the government and religion. *Catholic Bishop*, 440 U.S. at 501, 99 S.Ct. at 1319. In *Catholic Bishop*, the Court found that Board jurisdiction over faculty--administration relationships in schools permeated with a religious mission would similarly create a significant risk of entanglement. *Catholic Bishop*, 440 U.S. at 502-03, 99 S.Ct. at 1319-20. *Universidad*, 793 F.2d at 385-86.

A comparable risk exists in this case. Indeed, it is magnified because it is predictable that New Life will resist efforts of the state to dictate whom it can hire, thus generating additional entangling interaction.

Therefore, the nature of New Life, the nature of the East Longmeadow approval process, and the resulting relationship between government and religion indicate that defendants' conduct would foster excessive entanglement between church and state.

The East Longmeadow approval process for New Life did not, of course, progress to the point where the foregoing effects actually occurred. As the Court of Appeals for the First Circuit has said, however:

> It is not the obligation of [a school] to prove as a pre-condition of relief that this precise scenario, which hardly can be called speculative, in fact will unfold. To the contrary, in the sensitive area of First Amendment religious freedoms, the burden is upon the state to show that implementation of a regulatory scheme will not ultimately infringe upon and entangle it in the affairs of a religion to an extent which the Constitution will not countenance.

Surinach, 604 F.2d 75-76. See also *Committee for Public Education*, 444 U.S. at 646, 100 S.Ct. at 842-43; *Lemon*, 403 U.S. at 617, 91 S.Ct. at 2113.

In this case, defendants have not satisfied this burden. To the contrary, the court is persuaded that the approval process which East Longmeadow has sought to apply to New Life would result in an excessive entanglement of government and religion.

F. The Alternatives For Assuring That New Life Students Are Adequately Educated Would Not Violate The Establishment Clause.

As described in the Free Exercise Clause analysis, the court has found that the East Longmeadow approval process is not the least restrictive means of assuring that New Life students are adequately educated. Rather, the court has concluded that there is a less restrictive means of satisfying the state's interest in the education of New Life students. This consists of requiring New Life to provide either (1) information concerning the students, the school, the curriculum; and (2) standardized test results with appropriate individual follow-up or (3) such test results and follow-up coupled with a requirement that each teacher have appropriate academic credentials. Inherent in this finding is the court's conclusion that neither of these alternatives would violate the Establishment Clause.

Accommodating plaintiffs' religious beliefs by using a special alternative to the East Longmeadow approval process for them does not represent strict neutrality of the government toward religion. There is, in this respect, a certain tension between the Free Exercise and Establishment Clauses. However, the Supreme Court

> has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. See e.g., *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (judicial exemption of Amish children form compulsory attendance at high school); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (tax exemption for churches).

Hobbie, 107 S.Ct. at 1051; see also *Thomas*, 450 U.S. at 719-20, 101 S.Ct. at 1432-33; *Sherbert*, 374 U.S. at 409, 83 S.Ct. at 1797. In this case, neither of the possible less restrictive alternatives would create excessive entanglement or otherwise violate the Establishment Clause.

The Supreme Court has in several cases found that the Establishment Clause is not violated when the

State provides standardized tests to be administered to private religious school students. In *Wolman*, the Supreme Court approved the validity of spending public funds to furnish standardized tests and scoring services to religious schools. 433 U.S. at 238-41, 97 S.Ct. at 2600-01. In reaching this conclusion, the Court found that the state has a substantial interest in insuring that its youth receive an adequate secular education and that providing standardized tests to religious schools was an acceptable means of assuring that minimum standards of instruction were being met. Id. In addition, the court went on to find explicitly that "the inability of the school to control [the content] of the test eliminates the need for the supervision which gives rise to excessive entanglement." Id. at 240-41, 97 S.Ct. at 2601; see also id. at 261, 97 S.Ct. at 2612-13 (Marshall, J. concurring).

The Supreme Court reached the same result regarding standardized tests in *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980). In Regan provision of the tests was approved because the "New York plan calls for tests that are prepared by the

State and administered on the [private school] premises by nonpublic school personnel. The nonpublic school thus has no control whatsoever over the content of the tests." 444 U.S. at 654, 100 S.Ct. at 847.

In the funding cases, however, the Supreme Court apparently only considered the entanglement caused by the supervision necessary to assure that state funds are not being used for tests that promote religious purposes. When the test is devised by the state, there is no need for supervision to assure that the funds have paid for a test with religious content. In the instant case, the question of supervision has another dimension. State control of the content of the test does not negate the need for supervision when, as here, the state is concerned about whether the private school will administer the standardized tests properly, as is required for the results to be reliable. The question remains, therefore, whether the supervision needed to assure that proper standardized testing conditions exist creates an excessive entanglement between church and state.

The court finds that the supervision required to assure standardized testing conditions does not

involve excessive entanglement. The supervision necessary to monitor test conditions is not the type of continuing, comprehensive surveillance the Supreme Court has found objectionable. East Longmeadow could rely on New Life to administer the standardized tests. It could also engage an independent contractor to give the tests at New Life or have them administered to New Life students in the public schools.

These alternatives would require interaction between New Life students and East Longmeadow representatives no more than once or twice a year. This type of interaction is qualitatively different than the type of surveillance needed to assure that teachers are not injecting a sectarian message into their secular classes or that teachers are competent. A sectarian message cannot be prevented without having an overseer attending classes on a daily basis. *Lemon*, 403 U.S. 602, 91 S.Ct. at 2107; *Aguilar*, 105 S.Ct. at 3238. Similarly, individualized evaluation of teacher competency as envisioned by the East Longmeadow approval process involves a type of in depth personal surveillance and subjective evaluation not presented by an exam proctor. Thus, the

surveillance necessary to assure that test conditions are proper is not excessively entangling.

If a student's standardized test scores are adequate, East Longmeadow's involvement with that child and his family will be ended for that year. If the test scores are not satisfactory to East Longmeadow, they may be followed up by further testing and meetings between East Longmeadow officials, the child's parents, and possibly his teachers.

For the reasons described in detail in the Findings of Fact, the court is persuaded that New Life parents share the state's interest in having their children adequately educated and are likely to be responsive to documented concerns about the adequacy of their children's education. Thus, the court expects that at least most New Life parents would willingly participate in consultations with East Longmeadow concerning their children's test results and would agree to further testing when it was indicated. The Supreme Court has held that providing diagnostic testing, counseling and remedial services, when furnished at a neutral site, does not violate the Establishment Clause. *Wolman*, 433 U.S. at 243, 247-48, 97 S.Ct. at 2605; see also *Meek*, 421

U.S. at 368 n. 17, 371 n. 21, 95 S.Ct. at 1764-65 n. 17, 1766 n. 21.

The court also expects that at least most New Life parents would respond to significant problems identified by the testing process. They would likely respond by causing New Life to improve the education it offered, by transferring their child to another fundamentalist Christian school, or by placing their child in another school equipped to address their child's educational needs, as did the parents of one New Life third grader identified as having a learning disability.

If a child's parents did not take the steps necessary to satisfy the Town that the child would be adequately educated either at New Life or elsewhere, litigation seeking an order relating to the child's education or custody could be commenced. Litigation would, of course, be a form of intense involvement between parents and the state. It would, however, be predicated upon demonstrated educational problems arising in individual cases. It would not be the result of a general clash between the routine performance of a governmental function and the religious beliefs of a group. In any event,

the court expects that litigation will rarely be required.

As described earlier, it is neither necessary nor possible on the present record for the court to decide now whether a requirement that each New Life teacher have satisfactory academic credentials is a component of the least burdensome means of assuring that New Life students are adequately educated. It should be recognized, however, that the Supreme Court has suggested that requiring teachers to have certain academic credentials would not violate the Establishment Clause. *Board of Education* v. *Allen*, 392 U.S. 236, 245-46, 88 S.Ct. 1923, 1927-28, 20 L.Ed.2d 1060 (1968) (state may require that private school employ teachers of specified training, among other things, if attendance at that school is to satisfy state compulsory-attendance laws); *Wolman*, 433 U.S. at 240, 97 S.Ct. at 2601. Implicit in the Supreme Court's statements that a state may consider the credentials of private school teachers is the understanding that whether a teacher has required academic credentials is ascertainable from a review of records. It need not involve the intensive surveillance required to evaluate a teacher's

performance in the classroom which East Longmeadow's approval process would entail in the circumstances of this case. Nor would it entail the subjective evaluations and recommendations which are part of the East Longmeadow approval process.

IV

FUTURE PROCEEDINGS

The plaintiffs have prevailed in this case by proving that they are entitled to declaratory and injunctive relief. In their complaint, plaintiffs also request monetary damages, to which they may now also be entitled. No evidence on this issue, however, was offered at trial. Thus, it will be necessary that the parties confer and inform the court of their views on whether it is necessary or appropriate for the court to hold future proceedings on the issue of damages.

In addition, as plaintiffs have established a violation of their constitutional rights for which 42 U.S.C. s 1983 provides a remedy, they may be entitled to payment of their costs and reasonable attorneys' fees under 42 U.S.C. s 1988. The parties must also confer and inform the court of their positions on this issue.

V

CONCLUSION

[4] For the reasons described in detail in this opinion, M.G.L. c. 76, s 1, as East Longmeadow has sought to apply it to plaintiffs in this case, violates the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Thus, defendants must be enjoined from applying this approval process to plaintiffs. In addition, the state must be enjoined from enforcing M.G.L. c. 71, s 2 by prosecuting Mr. Romero, as a parent of a New Life student, for his failure to send his child to a public school or an approved private school.

The state, however, continues to have a compelling interest in assuring that New Life students are adequately educated. The court has not sought to decide precisely how East Longmeadow must deal with plaintiffs in part because of a "recognition that courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education." *Yoder*, 406 U.S. at 235, 63 S.Ct. at 1543. In addition, there may be more than one constitutionally acceptable way for the state to

discharge its duties in this case.

At this point, defendants must determine in light of this decision how they will attempt to satisfy in a constitutionally permissible manner the state's important interest in assuring that the children who attend New Life are adequately educated. The plaintiffs will have to respond to this effort. As indicated at the outset, if the parties proceed in the spirit of tolerance and respect for the integrity of each other's views which inspired the First Amendment, a mutually acceptable accommodation should be attainable. If they do not, further litigation may be inevitable.

VII

ORDER

In view of the foregoing, the court hereby declares that M.G.L. c. 76, s 1, as defendants have sought to apply it to plaintiffs, violates the First Amendment of the Constitution of the United States. It is, therefore, hereby ORDERED that:

1. Defendants are permanently enjoined from applying to plaintiffs the approval process at issue in this case;

2. Defendants are permanently enjoined from

prosecuting plaintiff Richard Romero, as a parent of a student at New Life Academy, pursuant to M.G.L. c. 71, s 2, for failure to send his child to a public school or to an approved private school;

3. The parties shall confer and inform the court by September 18, 1987 of their positions concerning awards of monetary damages, costs and reasonable attorneys fees and the related issues, if any, which they believe must be resolved in connection with those matters.

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Plaintiffs,

v.

TOWN OF EAST LONGMEADOW, et al.,
Defendants.

C.A. No. 83-580-WF.

United States District Court,

D. Massachusetts.

May 16, 1988.

MEMORANDUM AND ORDER

WOLF, District Judge.

All parties to this action have requested that the court direct, pursuant to F.R.Civ.P. 54(b), entry of final judgment as to the issues decided in its Memorandum and Order of July 27, 1987, thus authorizing a request for an immediate appeal of those issues. For the reasons described below, this is an unusual case in which the pressing needs of the

litigants outweighs the factors which usually require a complete resolution of all claims before an appeal concerning any of them is permitted. See, *Spiegel* v. *The Trustees of Tufts College*, 843 F.2d 38 (1st Cir.1988); *Morrison-Knudsen Co.* v. *Archer*, 655 F.2d 962, 965 (9th Cir.1981). Therefore, the court will grant the parties' request.

Plaintiffs in this case are the New Life Baptist Church, a congregation of born again Christians, its minister, and some of its members. Defendants are entities and officials of the Town of East Longmeadow, Massachusetts. The Commonwealth of Massachusetts was allowed to intervene on behalf of the defendants.

After a lengthy non-jury trial, on July 27, 1987 this court issued a detailed Memorandum and Order finding that as the East Longmeadow defendants sought to apply it to plaintiffs, M.G.L.A. c. 76 s 1--which requires that local school committees approve private schools in their jurisdiction--violates the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. *New Life Baptist Church Academy* v. *East Longmeadow*, 666 F.Supp. 293 (D.Mass.1987). Thus,

the court ordered that (1) defendants be permanently enjoined from applying to plaintiffs the specific approval process litigated in this case; and (2) that defendants be permanently enjoined from prosecuting plaintiff Richard Romero, as a parent of a New Life student, for failure to send his child to a public school, or to an approved private school. Id. at 328. The court did not decide the remaining questions concerning awards of money damages, costs, and reasonable attorneys' fees. Id.

As described in the opinion, this case arises from the competing, compelling concerns of plaintiffs and defendants for the children who attend New Life Academy. While the court decided, subject to possible judicial review, the legality of the specific approval process which was litigated, it did not--and on the record before it could not--decide the precise parameters of a constitutionally permissible means of assuring New Life students are adequately educated. Id. at 295, 327-28.

The court and the parties recognized that it would be most desirable if the parties could develop a mutually acceptable means of resolving their dispute, thus eliminating the need for further judicial

intervention. Accordingly, pursuant to a series of court orders and conferences, the parties have since July 27, 1987 made an apparently earnest, but unsuccessful effort to settle this matter.

This court is presented with the question whether to act now to allow the defendants to seek to appeal the July 27, 1987 decision, which resolves all issues in this case except damages, costs and reasonable attorneys' fees. A significant time-consuming effort will be required to decide the issues of damages and attorneys' fees. Plaintiffs wish to present additional evidence regarding damages and may be entitled to do so. In addition, when addressing the question of damages the court may be required to decide the unsettled issue of whether New Life as an organization may recover for any injury to that fledgling church caused by East Longmeadow's unconstitutional conduct. See Id. at 322, n. 16. Determining an appropriate award of reasonable attorneys' fees--likely to exceed six figures--will also be complex as this litigation has been conducted for more than five years and plaintiffs prevailed on most, but not all, of their original claims.

There are important reasons why an appeal of the issues already decided should not await resolution of the questions of damages and attorneys' fees. This case involves the state's compelling interest in assuring that children are adequately educated. The court has enjoined the specific method by which East Longmeadow sought to satisfy this interest. As the parties have not been able to agree on how the state's interest may be satisfied without violating plaintiffs' First Amendment rights, East Longmeadow wishes to appeal this decision. It is in the interest of the students of New Life Academy that the constitutionality of East Longmeadow's conduct be authoritatively decided as promptly as possible so that a constitutionally permissible means of assuring they are adequately educated can be instituted by East Longmeadow.

In addition, the question whether this court has correctly decided this case has implications for more than the present parties. Several original defendants, including the City of Boston, were dismissed from the case upon the stipulation that they would not seek to enforce the Massachusetts truancy law against individuals similarly situated to the New Life

plaintiffs until this case is finally adjudicated. See, 666 F.Supp. at 298 n. 4 and 315. In addition, the Attorney General has informed the court that "the substantive constitutional claims previously adjudicated [in this case] have application to other private schools operating within the Commonwealth of Massachusetts that may be placed in a similar situation vis a vis the local school committee approval requirements contained in M.G.L. c. 76, s 1." The Commonwealth of Massachusetts Memorandum in Response to Bench Order of April 20, 1988, dated April 27, 1988, p. 2. Thus, the effect of this court's decision in this case on the parties and others indicates that there is now a pressing need for an appeal to be taken.

In Spiegel, the First Circuit indicated that the *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F.2d 360, 364 (3rd Cir.1975) provides a helpful guide to the factors which ought to be considered in determining whether final judgment on some, but not all, claims should be entered. 843 F.2d at 43 n. 3. In Allis-Chalmers the court stated:

> In reviewing 54(b) certifications, other courts have considered the following factors, inter alia: (1) the relationship between the

> adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion certifying a judgment as final under Rule 54(b).

Allis-Chalmers Corp., 521 F.2d 364. In this case, these factors suggest that authorization of an immediate appeal of the decided issues would be appropriate.

The adjudicated and unadjudicated claims in this case are distinct. This court's future resolution of the unadjudicated claims--damages and reasonable attorneys' fees--will not affect the analysis of the First Amendment issues which the parties wish to appeal.

In addition, there does not appear to be a meaningful possibility that the need for review will be mooted by future developments in the district court.[18] This court has unsuccessfully encouraged settlement of this case. It now appears that an appeal, at some point, is inevitable.

Indeed, the East Longmeadow defendants have stated that Lyng is not "relevant to the facts or the law of [this case]." East Longmeadow's Memorandum in Response to Court Order of April 20, 1988 Relating Inter Alia to F.R.Civ.P. Rule 54(b) Appeal.

An immediate appeal would not present the risk that the Court of Appeals would have to consider the First Amendment issues in this case a second time. Those issues are fully adjudicated. In addition, there

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[18] The court is also unaware of any foreseeable Supreme Court decision which might militate in favor of delaying an appeal. The Supreme Court has recently addressed certain Free Exercise Clause issues in *Lyng* v. *Northwest Cemetary Protective Assoc.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). *Lyng*, however does not alter the Free Exercise analysis in this case. *Lyng*, is a factually distinguishable case which, in pertintent part, reiterates that where, as here, government action has a tendency to coerce individuals to act contrary to their religious beliefs, scrutiny, requiring the government to bring forward a compelling justification for its otherwise lawful actions, is necessary. Id. at ----, 108 S.Ct. at 1326.

is no claim or counterclaim which could result in setoff against the judgment sought to be made final.

Finally, in addition to serving the pressing needs of the parties, a Rule 54(b) certification would promote judicial economy. As indicated earlier, an appeal of the First Amendment questions already decided seems inevitable. If this court's decision on those issues is reversed, the challenging and time-consuming questions of damages and reasonable attorneys' fees will not have to be decided. If this court's decision is affirmed, those issues will be ripe for resolution and can be addressed on an up-to-date basis.

In view of the foregoing, this court concludes that there is no just reason for delay. Accordingly, it is hereby ORDERED that:

1. Final judgment shall now enter on all of the claims decided by this court's Memorandum and Order dated July 27, 1987; and

2. Litigation of the remaining claims concerning damages, costs, and reasonable attorneys' fees shall be stayed until further order of this court so that the parties may give their undivided attention to the anticipated appeal.

Supreme Court, U.S.
FILED
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CLERK

No. 89-1118

In the
Supreme Court of the United States

OCTOBER TERM, 1989

NEW LIFE BAPTIST CHURCH ACADEMY, ET AL.,
PETITIONERS,

v.

TOWN OF EAST LONGMEADOW, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Respondents in Opposition

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Questions Presented

1. Whether certiorari is warranted to review a case involving state regulation of a private religious school under the Free Exercise and Establishment Clauses of the First Amendment, where the court of appeals fully applied the traditional standards for First Amendment review consistent with a large and uniform body of law in the federal and state lower courts.

2. Whether certiorari is warranted to review the claim, not raised below, that the procedures of a local school committee for private school approval are unconstitutionally discretionary where those procedures implement objective standards for approval, the constitutionality of which has already been considered and upheld, set forth in the state's compulsory education statute.

3. Whether the court of appeals properly exercised its appellate authority in reviewing the findings of the district court.

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No. 89-1118

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TOWN OF EAST LONGMEADOW, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for the Respondents in Opposition

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 885 F.2d 940. The district court issued three decisions. The first, not included to Petitioner's Appendix is reported, *sub nom. Braintree Baptist Temple* v. *Holbrook Public Schools,* at 616 F.Supp. 81. The district court decisions appealed from (Pet.App. 51a-169a, and 170a-178a) are reported at 666 F.Supp. 293 and 718 F.Supp. 2.

Jurisdiction

The judgment of the court of appeals was entered on September 7, 1989, and rehearing was denied on October 13, 1989. The petition for a writ of certiorari was filed on January 11, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement

1. The Massachusetts General Laws ("M.G.L.") require all school age children to attend school. M.G.L. c. 76, § 2.[1] Pursuant to M.G.L. c. 76, § 1, to fulfill this requirement, children may attend a "public day school" in the town where they reside or "some other day school approved by the school committee" of the town where they reside. The school committee must approve a private school "when satisfied that the instruction in all the studies required by law equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town. . . ." However, the statute requires that the school committee "shall not withhold such approval on account of religious teaching. . . ." *Id.* M.G.L. c. 71, § 1, requires that schools employ teachers of "competent ability" and defines the required studies to include orthography, reading, writing, English, grammar, geography, arithmetic, drawing, music, the history and Constitution of the United States, the duties of citizenship, health education, physical education and good behavior.

[1] Chapter 76, § 2, provides a criminal penalty for truancy. Government officials also have the option of enforcing M.G.L. c. 76, § 1, through a civil care and protection petition pursuant to M.G.L. c. 119. The remedies under this provision could include a court order compelling education or even removal of the children from their parents' care. See *Care and Protection of Charles*, 399 Mass. 324, 329-331, 504 N.E.2d 592 (1987).

2. The petitioner New Life Baptist Church Academy ("New Life") is a private school founded in 1981 by the New Life Baptist Church, a Fundamentalist Baptist Church located in East Longmeadow, Massachusetts, to provide secular and religious education aimed primarily at "born again Christians" who share certain fundamentalist religious beliefs. Pet.App. 8a, 61a-62a. New Life believes that God is the sovereign and final authority in all human conduct and that, therefore, to submit their educational ministry to the prior or continued approval of secular authority would violate the sovereignty of Christ over his church and would, therefore, be a sin. Pet.App. 8a, 62a-63a.

New Life opened its school in 1981 without notifying the Respondent Town of East Longmeadow School Committee ("School Committee") or seeking approval. After being contacted by the Superintendent of the East Longmeadow public schools in 1982 with requests for information, New Life eventually indicated that it did not desire approval by the School Committee, but was willing to provide the information requested. Pet.App. 63a-67a. After the School Committee requested further information in early 1983, petitioners filed this lawsuit in federal district court in March, 1983. New Life so informed the School Committee by letter, but welcomed School Committee officials to visit the school anytime. Pet.App. 66a-70a.

3. The proposed procedure developed by the School Committee for use in determining whether the education provided at New Life complies with statutory requirements has been modified several times to accommodate New Life. Pet.App. 6a. As summarized by the court of appeals (Pet.App. 7a) and the district court (Pet.App. 71a-73a), the proposed process is as follows:

(a) Obtain information about the school's pupils, texts, daily class schedules, hours and days taught, compliance with health and safety rules, and curricula for each grade and subject.

(b) Examine the academic qualifications of faculty members.[2]

(c) Visit the school once, to meet with the administrator and to obtain a first-hand impression of teaching methods, instructional materials, and curricula.

(d) If the teachers lack adequate academic credentials, visit the school additional times to observe classroom teaching.

(e) Make suggestions for correcting deficiencies in the school's educational program (if any).[3]

If approval of a school program is obtained, the School Committee would review its compliance every two years, through written communications. If approval were denied, the school would be given a chance to improve and have approval reconsidered if it so desired. As a further accommodation to New Life, the School Committee agreed to forego a formal request for approval and conduct its own approval examination if New Life would simply submit factual information. Pet.App. 7a-8a.

4. With respect to these requirements of the School Committee, and of secular authority generally, as summarized by the court of appeals (Pet.App. 9a-10a) and the district court (Pet.App. 73a-81a), New Life has no objection to:

(a) complying with state health, safety and zoning rules;

(b) being incorporated under Massachusetts law;

(c) supplying the information required by the School Committee about the number of its students, the number of hours

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[2] The School Committee proposed to require that all teachers have college degrees, but intended to allow the school to employ some teachers who were studying for college degrees, but had not yet obtained them. Pet.App. 72a. The district court ruled that, under *Care and Protection of Charles, supra*, a college degree requirement was not permitted under Massachusetts law. Pet.App. 55a-56a. That ruling was not directly in contention on appeal.

[3] Further observation of teachers who lacked credentials and advice in furtherance of approval were intended by the School Committee to assist schools which would otherwise not be approved. See Pet.App. 49a, 72a-73a.

and days taught, the curriculum, texts, the number of teachers, and the criteria for hiring teachers;

(d) permitting School Committee officials to visit New Life occasionally to meet administrators and teachers, to read texts, and to observe classes;

(e) teaching the subjects required by state law, and holding classes the number of days required by state law;

(f) hiring teachers with adequate credentials, although, to the extent it indicates New Life's compliance with an approval requirement, they will not comply with requirements regarding specific teachers.

New Life does object, however, to any form of governmental approval of its educational program and to any procedure which is aimed at gaining such governmental approval. Therefore, New Life asserted, as to items (c) through (f), the specific requirements of the School Committee, that, although it does not object to the substance of those requirements, it would not meet those requirements since it cannot permit the School Committee any form of approval. Pet.App. 9a-10a, 73a-74a, 81a.

Because of these religious objections, New Life at trial proposed an alternative which permitted the School Committee no direct review and no approval at all of the educational program at the school itself. New Life asserted that it would have no objection if its students voluntarily submitted to standardized tests and if their parents voluntarily submitted their children's test scores to the School Committee. New Life also had no religious objection if the parents of children whose scores showed educational difficulties voluntarily consulted with public officials, with the voluntary participation of New Life staff, to determine a remedy to the problem. Pet.App. 10a, 82a.[4]

[4] The court of appeals stated that New Life proposed also voluntarily to submit factual information about the school to the School Committee in con-

5. Prior to trial, the district court heard defendants' motions to dismiss all counts of the complaint. *Braintree Baptist Temple*, 616 F.Supp. at 84. For various reasons, the court dismissed all causes of action raised in the complaint except those arising under the First Amendment for violation of the Free Exercise and Establishment Clauses. *Id.* at 87-92. Among the counts dismissed was one seeking the invalidation of M.G.L. c. 76, § 1, as unconstitutionally vague for failing to set adequate standards for approval of private schools. *Id.* at 91.

After evidentiary hearings, the district court ruled that the School Committee's proposed procedures violated the Free Exercise and Establishment Clauses of the First Amendment. First, it held that M.G.L. c. 76, § 1, was not unconstitutional but that it would consider whether the School Committee's application of the statute was. With respect to the Free Exercise claim, the court applied the traditional four-prong test[5] but held that it was not a balancing test under *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Thus, the court held it was prohibited from balancing its perception of the weight of the burden on

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junction with its students' taking of standardized tests. That, however, was not part of the proposal of New Life (See Pet.App. 82a), but rather was part of the alternative as envisioned by the district court. See *infra*, page 7.

[5] The relevant factors developed by this Court are:

(1) Whether a plaintiff's free exercise claim is motivated by a sincerely held religious belief. *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972).

(2) Whether, and to what extent, a plaintiff's free exercise of religion has been burdened by government regulation. *Yoder*, 406 U.S. at 217-219; *Sherbert* v. *Verner*, 374 U.S. 398, 403-406 (1963).

(3) Whether the state may justify any limitation on religious liberty by showing that its action is essential to accomplish a compelling or overriding governmental interest. *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *Yoder*, 406 U.S. at 219-234; *Sherbert*, 374 U.S. at 407.

(4) Whether any less intrusive means of achieving the state's compelling interest is available. *Thomas* v. *Review Board of Indiana Employment Security*, 450 U.S. 707, 718 (1981); *Sherbert*, 374 U.S. at 407.

religious belief against its assessment of the importance of the competing state interest or the cost to the School Committee of accommodating such a religious objection through an exception to its generally applicable procedure. Pet.App. 112a-118a.

The court then held that the petitioners' religious beliefs were sincerely held and were burdened by the School Committee's process, and that the state had a compelling interest in "basic education". Pet.App. 118a-138a. The court found, however, that the use of standardized tests was a less restrictive means of achieving that state's interest in education than was the School Committee's approval process. The court proposed an alternative which included (1) "providing" basic information regarding the students, school and curriculum; (2) standardized testing with individual follow-up and (3) possibly, a requirement that teachers have appropriate academic credentials.

With respect to this alternative, the court believed that an academic credentials requirement might be necessary because the expert testimony at trial had shown that standardized tests are "*ex post facto*" in nature — *i.e.* that they show only what a child learned in the past, not whether a school had teaching methods adequate to ensure academic growth in the future. The court nevertheless refused to order that academic credentials should be required. The court also recognized the concern that this procedure fails to reveal where students' knowledge was gained, and thus might mask teaching inadequacies. However, it held these concerns to be irrelevant since the state's interest in education is limited to determining what children know, not what schools teach. It held that the follow-up procedure would be effective because parents would cooperate and the School Committee could, absent cooperation, bring civil care and protection proceedings to compel education at an approved school or, possibly, remove children from their parents' care. Pet.App. 99a-100a, 139a-146a.

Finally, the court held that the School Committee's approval process violated the Establishment Clause because it engendered excessive entanglement between the state and religion through continuing surveillance of a religious institution as part of a regulatory scheme. In contrast, the court held that the alternatives it suggested would not violate the Establishment clause, either by favoring religion or by engendering excessive contacts between the government and a religious organization. Pet.App. 147a-166a.

As a result, the court issued an order permanently enjoining the School Committee from applying its approval process to petitioners and from prosecuting the parent petitioners for failure to send their children to an approved private school or a public school. Pet.App. 168a-169a. This order was later converted to a final judgment and certified for appeal. 170a-178a.

6. The court of appeals reversed. In doing so, it reviewed the whole record, and recognized that in First Amendment cases it must employ *de novo* review to questions of "constitutional fact".[6] Pet. App. 4a-5a. On the Free Exercise claim, the court also applied the traditional four-pronged test (see *supra*, page 6 n.5), and considered two questions — (i) whether the Free Exercise Clause forbade the School Committee from approving secular education offered at a religious school over a religious objection to such approval, and (ii) if not, whether the Free Exercise Clause forbade the School Committee from following its proposed approval procedures rather than the standardized testing procedures preferred by New Life. Pet.App. 12a-13a.

As to the first question, the court found that the School Committee may enforce the state law requiring direct approval of New Life's secular education program. It recognized New

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[6] Citing *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971); *Miller* v. *Fenton*, 474 U.S. 104, 113-115 (1985); *Bose Corporation* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

Life's sincere religious belief and that the approval requirement contained in state law burdened that belief. It also found that the state's interest in ensuring that children receive an adequate secular education is compelling, and that there was no way that interest could be served except through some form of state evaluation and approval. The court noted that such approval standards must be reasonable, but that, since they have not yet been presented or applied (other than those contained in the statute), there was no reason to believe they would not be constitutionally permissible. Pet.App. 13a-18a.

As to the second question, the court reached the fourth prong of the Free Exercise test — whether standardized testing constituted a "less restrictive" means of achieving the state's compelling goals. It noted that "least restrictive means" analysis is not self-defining. It must reflect the need to "balance" the state's interests against the probable burdens on religious freedom, the need to determine the extent to which accomodation of religious belief interferes with achieving the state's compelling interest, and the administrative considerations which arise from such accommodation, noting that the Free Exercise Clause gives the state some degree of administrative leeway.[7] Pet.App. 19a-24a.

Based on these considerations, the court found that the First Amendment does not preclude the School Committee from using its approval process, nor compel the use of the standardized testing method proposed by New Life and the district court. The court considered the numerous educational difficulties which arose from the voluntary nature of the standardized testing system considered by the district court, as well as the problems which the remedial "follow-up" with individual children would create under the Establishment Clause. Pet.App.

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[7] Citing *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988); *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961); *United States* v. *Lee*, 455 U.S. 252, 260-261 (1982).

26a-28a. The court raised numerous questions, suggested by the record, as to the efficacy of standardized testing to indicate academic progress. However, it did not view those questions as dispositive, but rather as indications of the types of obstacles and the significant additional administrative problems which such a system would impose upon the School Committee. Pet.App. 28a-32a.

The court considered the comparative religious burdens of the standardized testing method on New Life and concluded they were great, since New Life would be involved annually in the School Committee's approval of the tests to be given, and in negotiations with the School Committee over interpretation of the tests and the appropriate follow-up or remedial procedures. The burdens on the parents and students of New Life, the court concluded, would be even greater, since they risked enforced remedial or alternative schooling obligations or criminal and civil enforcement proceedings to remove children from their families. Even paying heed to New Life's preference for the procedure, the court concluded that it was not significantly less burdensome than the School Committee's proposed procedure. Pet.App. 31a-35a.

Finally, the court held that the weight of legal precedent was strongly against New Life's position, since numerous court's had considered and rejected religious objections to school approval and religious preferences for standardized testing in similar circumstances. Pet.App. 35a-37a. The court distinguished the instant case from *Yoder*, *supra*, and from cases involving pervasive and all-encompassing school regulations. Pet.App. 37a-40a.

With respect to the Establishment Clause, the court reviewed New Life's claim that the School Committee's review of teacher credentials would create excessive government entanglement with religion. The court considered the district court's findings on how such review would take place — *i.e.* with

one initial visit and additional visits only if teaching credentials are inadequate. Since New Life has no religious objection to hiring qualified teachers, and the district court found such teachers were available, the court held such additional visits might not take place. The court assumed that the School Committee would implement these proposed procedures reasonably, and noted that state law prohibited School Committee officials from considering religious matters in any school observation. Thus, the court held that, under this Court's cases on Establishment entanglement, the proposed visits were not impermissible since they did not implicate the provision of services to a religious school, did not seek to exercise control of religious matters, and were not unduly intrusive. Pet.App. 42a-47a. The court noted that, if not reasonably applied, the School Committee's procedures could become unduly entangling. But since additional visits were proposed only as an accommodation to New Life, if teachers lack credentials, to determine whether they nevertheless could teach adequately, the court found no precedent for holding such additional visits as proposed to be in violation of the Establishment Clause.

Argument.

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or any other court. Review by this Court therefore is not warranted.

1. There is no need, as petitioners claim (Pet. 14-22), for this Court to clarify the application of its Free Exercise standard to cases involving the manner of state regulation of education in religious schools. Petitioners assert (Pet. 19-21) that the lower courts are in confusion regarding the proper application of the standard. They claim the court of appeals (at Pet.App.

16a-17a), unlike the district court, wrongly eschewed the Court's Free Exercise cases in favor of the line of cases following *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925),[8] which set forth the state's right to regulate private school education. Petitioners are incorrect.

This Court's four-pronged Free Exercise standard was announced and developed in a series of cases. See *supra*, page 6 n.5. The court of appeals specifically adopted and applied that standard to both Free Exercise questions presented by petitioners — whether New Life's objection to approval *per se* may stand and whether its preference for standardized testing is constitutionally mandated. Pet.App. 12a-26a. The only dispute which arose between the district court and the court of appeals regarding the proper scope of the Court's Free Exercise standard was whether the Court has required or prohibited the use of a balancing test to apply the factors contained in that standard.

On this point, the court of appeals, which adopted a balancing approach, was clearly correct. As the court pointed out (Pet.App. 20a-21a), this Court has consistently used a balancing of interests approach in Free Exercise cases.[9] The lower courts have done the same.[10] In contrast, the district court

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[8] *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). See also *Committee for Public Education and Religiouis Liberty* v. *Regan*, 444 U.S. 646, 653-654 (1980); *Wolman* v. *Walter*, 433 U.S. 229, 240 (1977) (in reasonably regulating schools, states "may examine both teachers and pupils. . . .").

[9] *Texas Monthly, Inc.* v. *Bullock*, U.S. , 109 S.Ct. 890, 902 (1989); *Bob Jones University* v. *United States*, 461 U.S. 574, 603-604, and n.29 (1983); *Lee*, 455 U.S. at 256-260; *Thomas*, 450 U.S. at 718; *McDaniel* v. *Paty*, 435 U.S. 618, 628, n.8 (1978); *Yoder*, 406 U.S. at 214, 215, 221; *Sherbert*, 374 U.S. at 403.

[10] *Fellowship Baptist Church* v. *Benton*, 815 F.2d 485, 491 (8th Cir. 1987); *State* v. *Schmidt*, 29 Ohio St.3d 32, 505 N.E.2d 627, 629, *cert. denied* 484 U.S. 942 (1987); *State* v. *Patzer*, 382 N.W.2d 631, 634 (N.D.), *cert. denied* 479 U.S. 825 (1986); *Sheridan Road Baptist Church* v. *Department of Educa-*

misread *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136, 140 (1987), to call for the invalidation of the balancing test by using "strict scrutiny" language. However, the *Hobbie* language was a direct response to *Bowen* v. *Roy*, 476 U.S. 693 (1986), where a minority of the Court substituted a "reasonable means" approach for the compelling state interest prong of the standard balancing test. 476 U.S. at 707-708 (Opinion of Burger, C.J.). The *Hobbie* Court rejected this standard as "minimal scrutiny", and reaffirmed the traditional balancing test. It emphasized however, that the standard required strict scrutiny of the state interests involved. *Hobbie*, 480 U.S 141-142, citing *Yoder*, 406 U.S. at 215. Thus, the Court in *Hobbie* accepted the balancing test, contrary to the district court's claim.

Nor was the court of appeals' reliance on the *Pierce* line of cases (see *supra*, page 12, and n.8) inconsistent with the application of the appropriate Free Exercise standard, as petitioners claim. In fact, the court relied on those cases not in lieu of the Free Exercise standard, but rather to address the state's "compelling interest" as part of that standard. In answer to petitioners' assertion, and the district court's ruling, that a religious objection could block all state approval of education at a religious school, the court correctly held that the *Pierce* cases affirmed the state's overriding interest in its ability reasonably to regulate schools directly. Furthermore, since no way had been suggested to serve this interest without some form of approval, the court ultimately ruled that petitioners' religious objection to approval *per se* must give way. Pet.App. 14a-17a.

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tion, 132 Mich. App. 1, 348 N.W.2d 263, 270 (1984), *aff'd* 426 Mich. 462, 396 N.W.2d 373, 382 (1986), *cert. denied* 481 U.S. 1050 (1987); *Attorney General* v. *Bailey*, 386 Mass. 367, 375, 377, 436 N.E.2d 139 (1982), *cert. denied* 459 U.S. 970 (1982); *State* v. *Rivinius*, 328 N.W.2d 220, 224, 226, 229 (N.D. 1982), *cert. denied* 460 U.S. 1070 (1983); *State* v. *Riddle*, 168 W.Va. 429, 285, S.E.2d 359, 365 (1981); *State* v. *Shaver*, 294 N.W.2d 883, 889-891 (N.D. 1980).

In addition, contrary to petitioners' claim, there is absolutely no confusion or conflict in the lower courts regarding the application of the Free Exercise standard to cases involving the proper extent of state regulation of religious schools. The lower courts have in large numbers and with complete consistency held that state approval of religious school education is permitted in the face of sincere religious objections to such approval, and that the standardized testing approach is not constitutionally required where the government prefers information gathering and analysis.[11] A review of these numerous cases shows that, in virtually all of them, the courts identified and applied the same Free Exercise and balancing standard used by the court of appeals here, and upheld the state regulation involved.

No conflict with this broad body of law was created, as petitioners assert (Pet. 26), by the decision of the Eighth Circuit in *Murphy* v. *Arkansas*, 852 F.2d 1039 (8th Cir. 1988), where the court rejected a challenge to standardized testing required by Arkansas legislation permitting home schooling.[12] The fact that *Murphy* found standardized testing to be within the constitutionally acceptable range does not, of course, mean that it limited that range. Indeed, the court there approved standardized testing because it was the *only* safeguard the state had chosen to ensure adequate private education. It compared that choice to other states where greater safeguards, such as teacher

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[11] The court of appeals collected and categorized the long list of decided cases addressing these issues at Pet.App. 35a-37a. In addition to those cases, courts have also rejected religious objections to regulations or prohibitions on private schools or home education in *North Valley Baptist Church* v. *McMahon*, 696 F.Supp. 518 (E.D. Cal. 1988); *Mazanec* v. *North Judson-San Pierre School Corporation*, 614 F.Supp. 1152 (N.D.Ind. 1985), *aff'd*, 798 F.2d 230 (7th Cir. 1986); *Howell* v. *State*, 723 S.W.2d 755 (Tex.App. 1986); *State ex rel. Minami* v. *Andrews*, 65 Haw. 289, 651 P.2d 473 (1982).

[12] Arkansas had formerly constitutionally banned all home schooling. *Burrow* v. *State*, 282 Ark. 479, 669 S.W.2d 441 (1984).

certification and curriculum requirements, had been approved as constitutional. 852 F.2d at 1042-1043.

In the face of this consistent approach of the lower courts, as petitioners concede (Pet. 15, n. 17), this Court has always denied review.[13] Similarly, nothing in the court of appeals' approach here to the Free Exercise standard warrants review.

2. Petitioners next attempt to retrench their position by claiming (Pet. 22) that they do not object to all forms of approval, and have conceded that some form of approval is necessary. Thus, petitioners take this opportunity to claim (Pet. 23-28) that the School Committee's process is insufficient because it involves a discretionary procedure, rather than an objective standard, for approval.

However, this is not the claim which petitioners presented to either the district court or the court of appeals. On the contrary, it was petitioners' specific position, as both the district court and court of appeals found, that they had no religious objection at all to the substance of the requirements proposed by the School Committee, but instead held a strictly *per se* objection to the School Committee's approval or disapproval of the school's program itself. See *supra*, page 5.

Likewise, petitioners have never before raised, and neither the district court nor the court of appeals addressed, the claim that the School Committee's procedures are faulty because they lack objective standards. In any event, it is the Commonwealth's compulsory education statute (M.G.L. c. 76, § 1) which sets forth the standards for approval of private school education. Indeed, in the Commonwealth, the setting of such educational standards is a function reserved for the Legislature. See *Care and Protection of Charles*, 399 Mass. at 332. Thus,

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[13] Petitioners' list of cases in which certiorari was denied or appeals were dismissed for want of a substantial federal question (Pet. 15, n.7) fails to include *People* v. *Turner*, 121 Cal.App.2d Supp. 861, 263 P.2d 685 (1953), *dismissed for want of a substantial federal question*, 3247 U.S. 972 (1954).

the fact that the School Committee's requirements constitute "process" rather than standards is precisely because they are intended to be the School Committee's method for determining whether the objective standards of the statute are met. *Id.*

In this regard, it is the law of this case that the statututory standards for approval are sufficiently objective to be constitutional. The district court here so held in ruling on defendants' motion to dismiss below, and that ruling was not appealed. *Braintree Baptist Church*, 616 F.Supp. at 91. In addition, the state Supreme Judicial Court has reviewed and rejected the claim that the standards set forth in the statute are unconstitutionally vague for failure to provide objective standards or constitute an illegal delegation of authority to the school committees. *Care and Protection of Charles*, *supra*.

In *Charles*, after reviewing the statutory standards set forth in M.G.L. c. 71, §§ 1, 2, and 3, and the approval standards set forth in M.G.L. c. 76, § 1 (see *supra*, page 2), the Supreme Judicial Court held that this "body of substantive law . . . provides the superintendents and school committees of the Commonwealth with sufficient standards . . ." (*Id.* at 331) and " 'does not impermissibly delegate basic policy matters . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.' " *Id.* at 332, citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499; *reh'g denied*, 456 U.S. 950 (1982). Nor, since the statute specifically forbids the school committee from withholding approval of private schools "on account of religious teaching . . ." are any constitutionally protected rights implicated, a factor this Court has indicated is the most important in determining a statute's constitutionality in this area. *Hoffman Estates*, 455 U.S. at 499. *Care and Protection of Charles*, 399 Mass. at 331-332.[14]

[14] The court also set forth further guidelines "which provide particulars through which the reasonableness" of approval may be measured. *Id.* at 333.

Thus, the court of appeals here made no error in failing to to invalidate the School Committee's procedures as unduly discretionary. Not only was the issue not raised, the School Committee's procedures are strictly governed by the objective standards for approval set forth in the statute and the guidelines set forth by the Supreme Judicial Court, and thus are not unconstitutionally subjective.[15]

3. Petitioners next fault the adequacy of the court of appeals' review under the Establishment Clause, asserting (Pet. 28-30), that the court distinguished this Court's establishment cases and failed to recognize that the cases aim not only at protecting government from too much control by the church, but also at protecting the church from too much interference by the the government. This characterization is completely wrong.

In fact, the court of appeals made extensive analysis of whether the School Committee's procedures would result in burdensome or entangling contacts against which petitioners should be protected, relying on this Court's Establishment cases prohibiting such contacts.[16] Pet.App. 42a-43a, 45a-50a.

In addition to clarifying the approval standards, the court there noted that school committees should provide written statements of reasons on disapproval and the opportunity for an informal hearing.

Thus, this case is hardly "on all fours" with *Hague* v. *Committee For Industrial Organization*, 307 U.S. 496 (1939) (Pet. 26-27), which involved a town ordinance found to have no objective standards and which reached constitutionally protected acts, the rights of free speech and assembly. *Id.* at 501, 501, n.1, 516.

[15] New Life's related claim (Pet. 23, 24-25) that the School Committee's procedure is to be faulted because it is not yet final is likewise wrong. The record of this case shows that, prior to this litigation, the School Committee was attempting to shape a procedure which would serve its interests while not offending religious schools espousing Fundamentalist doctrine. See *supra*, page 3, Pet.App. 70a, 74a. The only reason that the procedure remains a "proposal" at this stage is that these negotiations ended when this suit was initiated, and the district court subsequently entered an injunction prohibiting further use of the procedure. See *supra*, page 8.

[16] *Aguilar* v. *Felton*, 473 U.S. 402, 413 (1985); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 765 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971); *Wolman*, 433 U.S. at 241-244; *Meek* v. *Pittenger*, 421 U.S.

4. Finally, petitioners claim (Pet. 30-34) that this Court's review is necessary because the court of appeals overstepped the bounds of its appellate role in reviewing the facts of this case. Petitioners do not dispute that *de novo* review was warranted in this First Amendment case under *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), and *Bose Corporation* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as the court of appeals held. Instead it asserts, without citation, that the appellate courts may make *de novo* review only of "ultimate constitutional facts" [17], but in reviewing "predicate facts" is bound by the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

Appellate courts are not limited in the manner suggested by petitioners. Rather, this Court has held that, in First Amendment cases, appellate courts must make an independent examination of the whole record.[18] Of course, *de novo* consideration may only be given to those facts with direct bearing on an ultimate constitutional question; that is, they must be those "special facts which have been deemed of constitutional significance." *Bose Corporation*, 466 U.S. at 505. As this Court later noted in *Miller* v. *Fenton*, 474 U.S. 104, 114-115 (1985), the fact/law relationship in the First Amendment area is critical. For this reason:

> [w]here, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal

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349, 369-372 (1975); *Tilton* v. *Richardson*, 403 U.S. 672, 687-688, *reh'g denied*, 404 U.S. 874 (1971).

[17] Petitioners suggest these would include only such questions as "Is a person a 'public figure' in a defamation case?; or, Does the state have a 'compelling interest' in a free exercise case?" Pet. 32.

[18] *Bose Corporation*, 466 U.S. at 499, 508; *New York Times Company* v. *Sullivan*, 376 U.S. 254, 284-286 (1964); *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963). See also *Harte-Hanks Communications, Inc.* v. *Connaughton*, U.S. , 109 S.Ct. 2678 (1989); *Rankin* v. *McPherson*, 483 U.S. 378, *reh'g denied*, 483 U.S. 1056 (1987).

> principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.

474 U.S. at 114. Citing *Bose Corporation*, 466 U.S. at 503.[19]

Petitioners mention two major areas where they believe the court of appeals improperly re-decided facts -- (i) the educational viability of standardized testing to measure academic progress (Pet. 31,33), and (ii) the number of visits proposed by the School Committee to observe the school (Pet. 31).[20] Each of these areas are unquestionably within the bounds of "special facts" of constitutional significance. The standardized testing issues, considered by the court of appeals at Pet.App. 28a-30a, bear directly on the constitutional question of whether standardized testing constitutes a "less restrictive alternative" which would fulfill the state's compelling interest in education. See *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 417. See

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[19] *Maine* v. *Taylor*, 477 U.S. 131 (1986), cited by petitioners (Pet. 34) is inapplicable, since it was a criminal case involving a Commerce Clause issue. The court there noted that the "clearly erroneous" standard has always been applied in such cases. 477 U.S. 145.

[20] Petitioners also mention (Pet. 32-33) the court of appeals' treatment of the academic component of education at the school as "secular", even though, they assert, the parties stipulated that the school's program was thoroughly religious in all areas. What the stipulation actually says (Pet. 6) is that petitioners "believe" their "education ministry" is scripturally based. This stipulation of belief, of course, goes only to whether petitioners hold a sincere religious belief which would be violated by complying with the School Committee's regulations, something the court of appaels accepted without question. Pet. App. 14a. The stipulation does not define whether, for purposes of constitutional law, petitioners carry on secular activities subject to government regulation. In this realm, the fact that petitioners may see their school program as a religious rather than secular activity is irrelevant. *Bowen*, 476 U.S. at 701, n.6.

also Pet.App. at 26a. Likewise, the nature of the visits contemplated by the School Committee's procedure is directly related to the constitutional question under the Establishment Clause of whether the procedure will "foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-613.

Furthermore, as with the fact/law distinction generally in First Amendment cases, what petitioners call factual conflicts can actually be categorized as differing legal judgments.[21] For instance, on the issue of standardized testing, the district court itself recognized concerns that standardized testing showed only what children had learned in the past (and thus was *ex post facto* in nature), and not where they had gained that knowledge or whether the school they attended had the skills to ensure continued academic progress. However, it made the legal judgment that, despite these concerns, the state's compelling interest could be adequately served if a teacher credential requirement were also imposed (something it ultimately failed to order). Likewise, it ruled that the state's interest was limited to ensuring that children learned, not that schools taught. Pet.App. 99a, 143a-144a.

The court of appeals, in addressing this issue, did not make specific findings but rather articulated the numerous concerns which the record suggested regarding the difficulties of utilizing a voluntary standardized testing procedure and the educational questions which arise about standardized testing results. These questions and concerns are similar to, albeit more extensively considered then, those recognized by the district court. The court of appeals did not even treat the questions raised as

[21] Indeed, so close was the fact/law relationship in this case that the district court made virtually identical findings regarding standardized testing and school visits, among other things, in both its Findings of Facts and Conclusions of Law. This in itself is an ample demonstration of why *Miller* held that appellate courts must not be bound by the presumptive force of factual findings by the trial court in First Amendment cases.

dispositive. It simply made the differing legal judgment that the very existence of those standardized testing issues ill-served the state's compelling interest because of the obstacles and administrative difficulties which resolving such questions would impose. Pet.App. 26a-32a.[22]

This was also the case with the issue of visits by the School Committee. Both courts held that the School Committee proposed one or more occasional visits to the school and that additional visits might be necessary, in lieu of disapproval, to accommodate the school if its teachers lacked credentials. See *supra*, pages 3-4. The court of appeals simply made a different legal judgment than did the district court, finding that no excessive entanglement would result.[23]

Finally, *Bose* points out that Rule 52(a) itself does not prohibit appellate courts from reviewing the whole record and in fact permits them to correct "a finding of fact that is predicated on a misunderstanding of the governing rule of law." 466 U.S. at 501. The district court here refused either to employ a balancing test in considering the state's compelling interest or to consider in any way the administrative burden which would

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[22] Petitioners also accuse (Pet. 33) the court of appeals of substituting its own opinion regarding education practices. Petitioners' assertion that the court of appeals concocted evidence is without basis. As the district court's somewhat truncated summary (Pet.App. 83a-94a) of the voluminous expert testimony in the case shows, there was plenty of opinion presented on both sides of this issue. Without burdening the Court with a detailed review of the record, it seems clear even from the district court summary that the court of appeals' questions about standardized testing find adequate basis in the record.

[23] The court of appeals recognized the district court's concern that such visits could be abused by the School Committee, but chose instead to assume that the procedure would be reasonably carried out. This it was bound to do under this Court's prohibition that courts not make constitutional determinations based on speculative or hypothetical threats. See *Laird* v. *Tatum*, 408 U.S. 1, 13-15, *reh'g denied*, 409 U.S. 901 (1972), 479 U.S. 911 (1986); *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 89-90 (1947).

be created by the use of petitioners' standardized testing alternative. See *supra*, pages 6-7. The court of appeals, in contrast, properly considered these factors (see *supra*, page 9). Thus, any new findings it made regarding the relative burdens of standardized testing were necessitated, and correctly so under Rule 52(a), by the district court's failure to apply the correct legal standard. In any case, in all areas mentioned in the Petition, the court of appeals stayed well within the area of review permitted by this Court.

Conclusion

The petition for a writ of certiorari should be denied.

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No. 89-1118

In the
Supreme Court of the United States

October Term, 1989

NEW LIFE BAPTIST CHURCH ACADEMY, et al.,
Petitioners,

v.

TOWN OF EAST LONGMEADOW, et. al.,
and
COMMONWEALTH OF MASSACHUSETTS,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION OF RESPONDENT, COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the Free Exercise Clause entirely bars a local school committee from approving the secular education of a private school because of the school's religious belief that subjecting itself to any approval by the state is a sin.

2. Whether an approval process which neither evaluates the religious teaching of a private school nor involves the state on an on-going basis in the affairs of the school constitutes excessive entanglement in violation of the Establishment Clause.

3. Whether an appellate court properly applies the constitutional fact doctrine when it accepts all purely factual findings of the trial court but reviews de novo the trial court's conclusion on the constitutional question whether this Court's "least restrictive means" test for analyzing Free Exercise claims has been satisfied.

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II. WHERE THE PROPOSED APPROVAL PROCESS WOULD NOT INVOLVE THE STATE IN THE ACADEMY'S AFFAIRS ON ANY LEVEL APPROACHING THE INEVITABLE AND SUSTAINED ENTANGLEMENT DISAPPROVED IN THIS COURT'S CASES, REVIEW OF THE ESTABLISHMENT CLAUSE CLAIM IS NOT WARRANTED. 25

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U.S. Supreme Court Rule 17.1 — 24

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The respondent-intervenor, Commonwealth of Massachusetts, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Court of Appeals' opinion in this case reported at 885 F.2d 940 (1989).

STATUTORY PROVISIONS INVOLVED

Mass. Gen. L. ch. 76, § 1, only a small portion of which is set forth in the Petition for Writ of Certiorari ("Pet.") at 3, is a lengthy statute dealing, inter alia, with compulsory attendance requirements for children residing in the Commonwealth of Massachusetts.

The statute provides in relevant part as follows:

> Every child between the minimum and maximum ages for school attendance established by the board of

> education[1/]...shall...attend a public day school in [the] town [where he or she resides] or some other day school approved by the school committee, during the number of days required by the board of education in each school year...but such attendance shall not be required of a child...who is being otherwise instructed in a manner approved in advance by the superintendent or the school committee. . . .

Regarding the approval of "other day school[s]," the statute additionally provides as follows:

> For the purpose of this section, school committees shall approve a private school when satisfied that the instructions in all the studies required by law[2/]

1/ The minimum age for school attendance is six, Mass Regs. Code tit. 603, § 8.02(1), and the maximum age is sixteen. 1965 Mass. Acts ch. 741.

2/ The studies required by law in Massachusetts are orthography, reading, writing, the English language and grammar, geography, arithmetic, drawing, music, the duties of citizenship, health education, and good behavior, Mass. Gen. L. ch. 71, § 1; the history and constitution of the United States and Massachusetts, Mass. Gen. L. ch. 71, § 2; and physical education, Mass. Gen. L. ch. 71, § 3.

> equals in thoroughness and efficiency, and in the progress made therein, that in the public schools in the same town; but shall not withhold such approval on account of religious teaching....

STATEMENT OF THE CASE

Petitioners' (hereinafter collectively called the "Academy") abbreviated chronology of communications between the Academy and the East Longmeadow School Committee ("School Committee"), and their repeated characterization of the School Committee's approval standards as "unarticulated," Pet. at 7 and 24, "subjective," Pet. at 9, "undefined," Pet. at 14, and "totally discretionary," Pet. at 23 (emphasis in original), are misleading in the extreme for three reasons.

First, the implication these characterizations seek to create is that the litigation is actually a dispute about the reasonableness of the School

Committee's proposed regulation of the Academy's educational activities. Throughout this litigation, however, the issue has never been whether the School Committee's private school approval criteria could be articulated with greater clarity, or in a manner that somehow made them more objective. On the contrary, the issue has always been, and continues to be, whether the Academy would submit to any standards for private school approval whatsoever.

As described in the District Court's findings of fact, the Academy has never wavered in its total opposition to submitting itself in any way to the approval of the School Committee. 666 F.Supp. at 297-299, Pet. App. at 62a-70a.

Indeed, the District Court found, pursuant to a stipulation of the parties, that "it is [the Academy's] sincere religious belief that to submit [its] educational ministry for the prior

or continued approval of secular authorities would violate the sovereignty of Christ over his church and would, therefore be a sin." 666 F.Supp. at 297, Pet. App. at 63a. The Court further found that the Academy "would for religious reasons refuse to submit [itself] for approval by the [School Committee] even if approval was likely to be easily obtained." 666 F.Supp. at 300, Pet. App. at 74a.

Second, to the extent that the School Committee expressed a willingness to be flexible in its approach to approval of the Academy, this merely reflected an effort to accommodate the concerns of the Academy and not, as the Academy would have it, the absence of objective standards. For example, the School Committee had initially requested that all private school teachers hold

college degrees,[3/] a standard that a majority of the Academy's teachers have never met. 666 F.Supp. at 301 n. 5, Pet. App. at 76a n.5.[4/] In an effort

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3/ Contrary to the Academy's contention, Pet. at 8 n.4 and 31, the Massachusetts Supreme Judicial Court has not held that Massachusetts law prohibits school committees from requiring that private school teachers possess college degrees. Care and Protection of Charles, 399 Mass. 324, 504 N.E.2d 592 (1987), held that parents seeking to instruct their children in a home setting could not be required to hold college degrees as a condition of approval. Id. at 339. This case hardly establishes that a degree requirement for private school teachers is invalid.

4/ The District Court found that the School Committee had "a reasonable basis to be concerned about the qualifications of at least some New Life teachers to instruct children." 666 F.Supp. at 306, Pet. App. at 95a. The Academy, in any event, has no religious objection to employing college graduates, so long as they meet the Academy's religious qualifications. Such teachers, moreover, appear to be available; the Academy turned down five college-trained applicants for teaching positions because it did not have openings for them. 666 F.Supp. at 301, Pet. App. at 77a and n.7.

to accommodate the Academy on this issue, School Committee officials agreed to accept lesser credentials for a limited number, but not a majority, of the Academy's teachers. 666 F.Supp. at 300, Pet. App. at 72a.

Finally, the Academy's discussion of its "standardized testing" proposal is misleading. Standardized testing, as proposed by the Academy and endorsed by the District Court, is an alternative to private school approval rather than an alternative means of obtaining such approval. The proposal depends entirely on voluntary cooperation of parents in the periodic administration of standardized tests in all required subjects to Academy students; the submission of the results by the parents, rather than the Academy, to the School Committee (or to committees in other communities where Academy students reside); subsequent meetings between

parents and local school officials; and such follow-up by local school officials, including the possible seeking of "care and protection" orders[5/] should the parents fail to respond to their children's educational needs. 666 F.Supp. at 303, Pet. App. at 81a-83a. The proposal relies entirely on the voluntary or coerced cooperation of individual parents and students and would not require the Academy itself to take any action to improve its educational deficiencies no matter how grave. It would, therefore, give the School Committee no recourse regarding the Academy's educational program

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5/ See Mass. Gen. L. ch. 119, § 24. Care and protection proceedings are a drastic measure aimed at depriving parents of custody of their children. It is a remedy which, as the Court of Appeals has pointed out (885 F.2d at 950, Pet. App. at 33a-34a), is far more intrusive than the approval process under chapter 76, § 1.

regardless of how many students were failing to make satisfactory progress. As the Court of Appeals concluded, this alternative "would 'materially detract'...from the state's efforts to 'accomplish its [compelling] purpose'...thereby 'unduly interfer[ing] with fulfillment of the governmental interest,'...without a compensating reduction in the 'restrictive' nature of the burden imposed on religious freedom." 885 F.2d 940, Pet. App. at 26a (citations omitted).

REASONS FOR DENYING THE WRIT

The Academy states that "New Life Baptist Academy is not objecting to all state regulation of private religious education...[, b]ut it has taken religious and constitutional offense at the method employed by the School Committee of the Town of East Longmeadow." Pet. at 22-23. In fact,

the issue in this case is and has always been the Academy's objection to any state approval process and its insistence on an "alternative" that would deprive the School Committee and the Commonwealth of any authority to approve or regulate private schools.

The Academy attempts to frame the Free Exercise and Establishment Clause issues in this case as novel and substantial enough to merit this Court's review. In fact, the Court of Appeals' decision is wholly consistent with a long line of Supreme Court precedent. It applied the appropriate standards and came to the proper conclusions. Moreover, in its analysis, the Court of Appeals properly applied the constitutional fact doctrine requiring de novo review of First Amendment questions of constitutional fact. Accordingly, the writ should be denied.

I. THE COURT OF APPEALS' RESOLUTION OF THE ACADEMY'S FREE EXERCISE CLAIM IS WHOLLY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals accurately posed the primary issue in this litigation when it asked, "does the First Amendment's Free Exercise Clause forbid the state (i.e., the School Committee) to insist upon approving the secular education[6/] offered by a religious school that believes it sinful to submit even its secular program to the approval of secular authorities?" 885 F.2d at 944, Pet. App. at 12a.

6/ The Academy would have this Court believe that the Court of Appeals distorted the record by treating the academic component of its curriculum as "secular." Pet. at 4-5, 32-33. Yet there is no indication in the voluminous record that the School Committee's concerns involved matters that could in any way be construed as other than secular. Any consideration by the School Committee of religious matters, moreover, would be strictly forbidden by Mass. Gen. L. ch. 76, § 1, which expressly forbids the School Committee from "withhold[ing its] approval on account of religious teaching."

On this question, the Court of Appeals properly concluded that the answer was clearly no. 885 F.2d at 944, Pet. at 13a.

A. This Court's precedents establish that states may set standards for the approval of private schools.

Nearly 70 years of this Court's opinions underscore the state's compelling interest in regulating education. Education was identified as a matter of "supreme importance" in Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Shortly thereafter, the Court accepted as a given "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school . . . " Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925). Later cases have conditioned

parents' right to send their children to a religious school on "the school meet[ing] the secular educational requirements which the state has power to impose," Everson v. Board of Education, 330 U.S. 1, 18 (1947); have held education to be "the most important function of state and local government," Brown v. Board of Education, 347 U.S. 483 (1954); have acknowledged that the state's authority to set educational standards for private schools, including teacher qualifications, is "a sensible corollary of Pierce," Board of Education v. Allen, 392 U.S. 236, 247 (1967); have declared "no doubt as to the power of the State . . . to impose reasonable regulations for the control and duration of basic education," Wisconsin v. Yoder, 406 U.S. 205, 213 (1971); and have stressed that "[parents] have no constitutional right to provide their

children with private school education unfettered by reasonable government regulation," Runyon v. McCrary, 427 U.S. 160, 178 (1976).

The Academy seeks to dismiss this steady line of opinion as mere dicta "the collective weight of [which] has become a burden too great for religious litigants to overcome." Pet. at 19. It claims, moreover, that this Court's review is required because these decisions somehow conflict with what it characterizes as this Court's "modern free exercise doctrine," a doctrine which it claims the Court of Appeals ignored. Pet. at 20-21. Even the briefest examination of these claims, however, reveals them as spurious.

First, the principles contained in the line of cases the Academy seeks to dismiss are non-controversial. Indeed, the Academy itself nowhere contests the

proposition that the state has a compelling interest in the basic education of children, and the Academy expressly concedes in its Petition that the State may reasonably regulate private religious education. Pet. at 22.

Second, these principles are not in conflict with any other decisions of this Court. Rather, as discussed immediately post, the cases characterized by the Academy as this Court's "modern free exercise cases," Pet. at 20, establish a test for evaluating Free Exercise claims which recognizes both the state's compelling interest in education and the permissibility of state regulation of religious schools in service of that compelling interest. This is precisely the test employed by the Court of Appeals in evaluating the Academy's Free Exercise claim.

B. The Court of Appeals used this Court's test for the evaluation of Free Exercise claims.

The Court of Appeals, as well as the District Court, utilized the four-part test developed by this Court for evaluating Free Exercise challenges. That test seeks to determine: (1) whether the religious beliefs in question are sincerely held; (2) whether these beliefs are burdened by the proposed state action; (3) whether that proposed action serves a compelling state interest; and (4) whether that proposed action serves the compelling interest by the least restrictive means. 885 F.2d at 944, Pet. App. at 12a-13a; 666 F.Supp. at 312, Pet. App. at 111a-113a. This test is drawn directly from Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963); Hobbie v.

Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987); and United States v. Lee, 455 U.S. 252 (1982), all cases from the very "modern free exercise" line which the Academy claims the Court of Appeals somehow ignored. Pet. at 19-20 & n. 8.

The Court of Appeals, applying this test, found that the Academy's religious belief that submission of its school to state approval was sincere. Second, it concluded that School Committee approval of the Academy burdened that belief. 885 F.2d at 944, Pet. App. at 14a. Third, however, it concluded, in light of the many cases discussed ante, at 12-14, that the state had a compelling interest in regulating private education. 885 F.2d at 944, Pet. App. at 16a-17a.

The Academy articulates no objection to the Court of Appeals' conclusion

regarding this third part of the Free Exercise test. Rather it is in the Court's application of the fourth, "least restrictive alternative" portion of the Free Exercise test that the Academy seeks to find fault. Under this test, the Court of Appeals compared the School Committee's proposed process, involving a review of curriculum materials and staff credentials,[7/]

7/ The Academy insists, as noted ante, at 3, that the School Committee's standards were "subjective," and cites Hague v. CIO, 307 U.S. 496, 516 (1939), for the proposition that constitutional rights should not be infringed on the basis of "mere opinion." The underlying ordinance in Hague, however, was held void upon its face because it bestowed limitless discretion on city officials. Id. In contrast, Mass. Gen. L. ch. 76, § 1, sets clear standards for the exercise of governmental discretion, and expressly forbids evaluation of religious teachings. It has, therefore, been held to be constitutional by both federal and state courts. Braintree Baptist Temple v. Holbrook Public Schools, 616 F.Supp. 81, 91 (D. Mass. 1984); Care and Protection of Charles, 399 Mass. at 330-333.

with the Academy's proposed alternative involving the voluntary annual administration of standardized tests to Church students. 885 F.2d at 943, Pet. App. at 10a. Its conclusion was unequivocal:

> [T]he record reveals too many potential educationally-related difficulties, and too little alleviation of the burden on religion, to justify the district court's conclusion that standardized testing is a "less restrictive alternative."

Id. at 448, 26a (citations omitted).

In performing its least restrictive means analysis, the Court of Appeals began with this Court's directives to ensure that the state practices in question were essential to accomplish the overriding governmental interest, United States v. Lee, 455 U.S. at 257-258, and were indeed the least restrictive means of fulfilling that interest. Thomas v. Review Board, 450 U.S. at 718. The Academy does not

object to the application of these cases, which are part of what it identifies as the Court's "modern" line of Free Exercise law. Pet. at 19-20.

As the Court of Appeals recognized, however, practical guidance is required in applying the concept of least restrictive means. In finding such additional guidance in the precedents of this Court, the Court of Appeals properly considered whether the Academy's proposed standardized testing alternative would actually satisfy the state's concededly compelling interest in education and whether that alternative would substantially avoid burdening religious beliefs. 885 F.2d at 946-947, Pet. App. at 19a-25a. As the Court of Appeals correctly points out, the approach it took was no less an application of a strict scrutiny/compelling state interest test

because it aimed "to determine in a practical way whether or not standardized testing is a constitutionally mandated less burdensome alternative" to meeting the state's compelling interest in education. 885 F.2d at 947, Pet. App. at 24a-25a; see id. at 946, 20a-21a.

C. The Court of Appeals correctly applied this Court's Free Exercise test.

The Court of Appeals exhaustively examined the central question whether the Academy's standardized testing alternative was in fact a less restrictive alternative to the School Committee's proposed approval process. In doing so it arrived at two appropriate conclusions.

First, it concluded that the testing proposal would not fulfill the state's compelling interest in assuring the basic education of its citizenry. The

Court pointed to the difficulties entailed in a testing system that was wholly voluntary:

> How can the Academy make certain the students and their parents agree to the testing plan? Suppose they do not. Suppose a parent refuses to permit the Academy to give the Committee the test results. Suppose a parent refuses to permit his child to participate in the testing, or in the remedial "follow-up." (Suppose, for example, a parent decided that doing so amounted to impermissible cooperation with secular authorities.)"

885 F.2d at 948, Pet. App. at 26a-27a. It pointed out the Establishment Clause problems inherent in a plan that would involve the School Committee in administering remedial follow-up to those students who tested poorly, id. at 948, 28a, and the limits of testing in evaluating what will occur in the classroom and whether basic skills which "do not readily reduce themselves to standardized test questions" are being taught. Id. at 948-949, 28a-30a.

Second, it concluded that the testing proposal does not "substantially alleviate[] the burden upon the free exercise of religion," id. at 950, 34a-35a, because the testing alternative "involves and implicates the Academy, at least to a degree, in the very approval process to which it objects." Id. at 949, 33a. Moreover, the testing proposal "risks imposing still greater burdens upon individual parents or children" because it leaves the School Committee with the drastic remedy of "enforc[ing] test-taking through criminal prosecutions and civil orders to remove children from their families." Id. at 950, 33a-34a.

Finally, as the Court of Appeals noted, the weight of legal precedent is strongly against the voluntary testing alternative, id. at 951, 35a-37a, which no other state has adopted. Id. at 949,

30a.[8/]

The Academy in its petition complains of the burdens imposed by the School Committee's proposed approval process, but nowhere does it address (except to the limited extent addressed in Part III, post) the Court of Appeals' conclusions about the inadequacy of its testing alternative. Its silence on this point is telling. In short, the Academy has has failed to articulate a position that satisfies the standard in U.S. Supreme Court Rule 17.1 that "[a] review on writ of certiorari...will be

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8/ Contrary to the Academy's suggestion, Pet. at 26, the Court of Appeal's rejection of the standardized testing alternative does not create a conflict in the ciruits. Murphy v. Arkansas, 852 F.2d 1039 (8th Cir. 1988), upholds a state regulatory scheme in which standardized testing was one of the mechanisms proposed by the state to monitor home education. Nothing in Murphy suggests that religious schools may require a state to limit its educational review to standardized testing.

granted only when there are special and important reasons therefor."

II. WHERE THE PROPOSED APPROVAL PROCESS WOULD NOT INVOLVE THE STATE IN THE ACADEMY'S AFFAIRS ON ANY LEVEL APPROACHING THE INEVITABLE AND SUSTAINED ENTANGLEMENT DISAPPROVED IN THIS COURT'S CASES, REVIEW OF THE ESTABLISHMENT CLAUSE CLAIM IS UNWARRANTED.

The Academy, in an attempt to persuade the Court to review this case, raises the specter of excessive entanglement of the state in its religious affairs. Pet. at 28-30. Apart from citing the uncontroversial proposition that freedom of religion is impaired by excessive government intrusion into sacred matters, Pet. at 29-30, and from asserting that the government in this case has "leaped the wall of separation [of church and state] and . . . the church [is] crying out for protection," Pet. at 30, the petitioner offers no critique of the Court of

Appeals' Establishment Clause analysis and no reason why this Court should review this case.

Indeed the only case it cites - Aguilar v. Felton, 473 U.S. 402 (1985) - fully supports the Court of Appeals' sound conclusion that the magnitude and type of state involvement condemned in the cases of this Court is nowhere approached by the facts of this case. See 885 F.2d at 952-953, Pet. App. at 42a-50a. Aguilar involved a federal aid program to religious schools which, in order to ensure an absence of religious content in the federally funded classes, imposed "a permanent and pervasive state presence in the sectarian schools receiving aid," 473 U.S. at 413, "whose primary purpose [was] to monitor teachers and students in an attempt to guard against the infiltration of religious thought." Id.

Here, by contrast, the proposed approval process would be neither permanent and pervasive nor aimed in any way at monitoring or eliminating religious content. Rather, the School Committee's proposed evaluation of the school would involve a review of written information about the school together with an on-site inspection of the school limited in time to that necessary to review secular curriculum and instructional methods and to determine whether the Academy's teachers are adequately qualified to teach the required secular subjects. 666 F.Supp. at 299-300, Pet. App. at 70a-73a. That evaluation, as the Court of Appeals pointed out, might well amount to a single on-site visit. 885 F.2d at 952, Pet. App. at 43a. If the school chose to maintain a high number of teachers without college degrees, more visits

might be required, but only those necessary to make an evaluation of their teaching skills. Id. at 952, 43a. Once this was done, inspection would cease, and once approved, the school would be subject to School Committee review chiefly through written communications once every two years. Id. at 942, 7a-8a.

The Court of Appeals, after an extensive survey of this Court's precedents, could find "no case that goes so far as to find an Establishment Clause violation in such circumstances," id. at 953-954, 48a, and the Academy has cited none. Indeed, as the Court of Appeals observed, "to say that the Establishment Clause forbids the proposal would amount to saying that the Clause forbids any classroom observation or 'check,' a holding that could significantly inhibit the state's efforts to evaluate the secular

education provided by religious schools . . . , evaluations that . . . are of critical importance to the State." Id. at 954, 49a (citations omitted). The Academy's invitation to use this case as an opportunity to achieve so radical a result should be rejected.

III. THE COURT OF APPEALS PROPERLY APPLIED THE CONSTITUTIONAL FACT DOCTRINE

The Academy, citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 54 (1971), concedes, as it must, that "First Amendment questions of 'constitutional fact' compel [an appellate court's] de novo review," Pet. at 32, and that "[o]f course the appellate court must be free to make a de novo review of the ultimate constitutional facts." Pet. at 32. The Academy, therefore, does not challenge this Court's constitutional fact doctrine.

Rather, its contention is merely "that the Court of Appeals misapplied this doctrine," Pet. at 32, and that it did so by "reinterpreting the predicate facts of the case." Pet. at 32. This claim, with its allusion to Fed. R. Civ. P. 52(a), Pet. at 30, appears to be that the Court of Appeals ignored the purely factual findings of the District Court upon which it predicated its legal conclusions.

The Academy does not cite a single page in the record or in the opinions below to support its claim.[9/] Rather, its argument appears to rely principally on the general assertion that the Court of Appeals "became its own expert witness on education, freely

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9/ This lack of citation to the record in an argument the evaluation of which obviously requires examination of particular findings of fact, is in itself a sufficient ground for denying the petition. See Rules of the Supreme Court of the United States, Rule 15.5

substituting its own opinions about the values of various educational practices." Pet. at 33.[10/]

10/ Apart from this assertion, the Academy alleges to two other factfinding errors of the Court of Appeals. First, it charges that the Court of Appeals "treated the academic component of the education of [the Academy] as 'secular' in nature," and thereby ignored the Academy's sincere religious belief that the secular and religious aspects of its teaching were intertwined. Pet. at 32-33. Nowhere, however, does the Court claim that academic teaching at the school is completely free of religious content. Its references to the secular education of the Academy is merely a reference to those aspects of the school's teaching which the School Committee can properly review. See ante at 11 n.6.

Second, the Academy claims that "[t]he Court of Appeals . . . treated the facts as if there were only a limited number of visits proposed to observe the school." Pet. at 31. What the Court of Appeals said, however, was that the School Committee planned to visit the Academy once, but, in the absence of teachers with adequate credentials, would be required to visit more than once. 885 F.2d at 941-942, Pet. App. at 3a, 7a. This is entirely consistent with the District Court's findings. See 666 F.Supp. at 300, Pet. App. at 72a.

This assertion, however, is simply untrue. Nowhere does the Court of Appeals disregard a purely factual finding of the District Court. It merely "come[s] to legal conclusions different from those of the district court." 885 F.2d at 941-942, Pet. App. at 11a. Indeed, this is perhaps best illustrated by the Court's discussion of the expert testimony.

To use the Academy's example, it is simply not true that "[t]he court of appeals completely disregarded the findings of fact entered by the district court as to the educational viability of standardized testing as a means of measuring academic progress." Pet. at 31. The Court of Appeals did not reject the expert testimony concerning the general usefulness of standardized testing. Rather, following the dictates of this Court's constitutional fact

doctrine, it independently examined the record to determine whether the particular standardized testing alternative proposed by the Academy adequately served the state's compelling educational interest, and whether that alternative was a less restrictive alternative than the School Committee's process.

Its legal conclusion that the Academy's proposal did not constitute a less restrictive alternative to meet the state's compelling interest was not based on the merits or demerits of standardized testing in the abstract but on the particular inadequacies of the Academy's proposal. These numerous inadequacies were, as summarized ante at 21-23, found largely in the purely voluntary nature of the testing, the difficulties inherent in a proposal that would depend on the state administering

(perhaps coercively) remedial follow-up to those students who tested poorly, and in the Free Exercise burdens posed by the alternative testing plan itself. 885 F.2d at 948-950, Pet. App. at 26a-35a.

Once again, the Academy fails to point this Court to a single deficiency in these conclusions. This is because these conclusions are sound. In sum, the Court of Appeals fully adhered to this Court's constitutional fact doctrine and properly determined that voluntary standardized testing did not constitute a less restrictive alternative means to satisfy the state's compelling interest in the education of its children.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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